

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS RACHFORD, et al.,

Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, et al.,

Defendants.

RELATED CASES

No. C 03-1103 PJH

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,

Plaintiff,

v.

EMERY WORLDWIDE AIRLINES, INC.;
EMERY AIR FREIGHT CORP. d/b/a
EMERY WORLDWIDE a/k/a EMERY
FREIGHT FORWARDING, INC. a/k/a
MENLO WORLDWIDE; and CNF, INC.,

Defendants.

No. C 03-1449 PJH

THOMAS RACHFORD, et al.,

Plaintiffs,

v.

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL, et al.,

Defendants.

No. C 03-3618 PJH

On September 30, 2004, and October 1, 2004, the court conducted an evidentiary hearing on the question whether Emery Worldwide Airlines, Inc. ("EWA") and the Air Line

Pilots Association, International (“ALPA”) had reached an agreement in which they settled the grievance filed by ALPA on behalf of airline pilots who lost their jobs when EWA ceased flight operations in December 2001.

At the evidentiary hearing, the parties presented witness testimony of Marcus Migliore (“Migliore”), in-house counsel for ALPA; Captain Howard Attarian (“Attarian”), Executive Assistant to Captain Duane Woerth (“Woerth”), President of ALPA; and Sheldon Kline (“Kline”), outside counsel for EWA.¹ In addition, the parties stipulated to the admission of testimony in the form of deposition transcripts of Woerth; Captain Jeffrey Haddock (“Haddock”), the Custodian for ALPA’s Master Executive Council for EWA; Troy Englert (“Englert”), Senior Economic Analyst, ALPA; Gene Granof (“Granof”), in-house counsel for ALPA; Don Fausset (“Fausset”), former Vice-President of Human Resources and Labor Relations for Emery Air Freight Corporation d/b/a Emery Worldwide (“EWW”); David Grant (“Grant”), outside counsel for EWW; Eberhard Schmoller (“Schmoller”), general counsel to CNF, Inc., parent company of EWA and EWW; Terry Kierce (“Kierce”), former manager of financial analysis, contract administrator, and manager of compensation and benefits for EWA; Ronele McCurdy (“McCurdy”), former Director of Employee Relations for EWW; and Magdalena Jacobsen (“Jacobsen”) the mediator at the February 5, 2003, mediation session in San Francisco.²

BACKGROUND

The background facts are more fully set forth in the court’s order of May 28, 2004. Briefly, EWA was formerly in the business of providing air transportation as a “common carrier by air” as that term is defined in the Railway Labor Act (“RLA”), 45 U.S.C. §§ 151-188. EWA, which ceased operations in December 2001, operated a fleet of freighter aircraft used exclusively by EWW a/k/a Menlo Freight Forwarding. EWA and EWW were wholly-owned subsidiaries of CNF, Inc. (“CNF”).

¹ Citations to the transcript of testimony from the evidentiary hearing are indicated as “Tr. at ____.” The names of the witnesses are indicated in parentheses.

² Citations to deposition transcripts are indicated as, e.g., “Woerth Depo. at ____.”

1 In 1987, ALPA became the collective bargaining representative under the RLA of the
2 pilots and flight engineers employed by EWA. In September 2000, the EWA flight crew
3 members, represented by ALPA, entered into a collective bargaining agreement ("CBA") with
4 EWA.

5 On August 13, 2001, the Federal Aviation Administration ordered an immediate
6 suspension of EWA's operations for 60 days, citing EWA's violations of air safety regulations.
7 As a result, EWA furloughed its flight crew members. ALPA filed a grievance concerning
8 EWA's suspension of operations ("the August 2001 grievance"), and the furloughing of its
9 flight crew members, and scheduled a System Board arbitration. After presiding over a
10 number of hearings, Arbitrator Robert O. Harris recessed the arbitration without issuing a
11 decision so that the parties could attempt to resolve their disputes through mediation.

12 On August 27, 2001, representatives from EWA and ALPA commenced "effects"
13 bargaining, pursuant to the RLA. The negotiations continued in September 2001 in Ohio. The
14 purpose of the negotiations was to reach an agreement on issues related to the suspension of
15 operations and the furloughs. See Pittsburg & Lake Erie Railroad v. Railway Exec. Ass'n,
16 491 U.S. 490 (1989).

17 On December 5, 2001, CNF announced that EWA and EWW would permanently
18 cease operating their fleet of aircraft, and that the previous layoffs of EWA flight crew
19 members would be permanent. In January 2002, ALPA filed a second grievance (the
20 "shutdown grievance"), asserting that the December 2001 shutdown and the continued
21 furlough of all EWA's flight crew members violated the CBA. The parties continued the effects
22 bargaining concerning the pending grievances in January 2002 in Washington, D.C., and in
23 February 2002 in Dallas, Texas, with mediator Robert Kasher.

24 THE FEBRUARY 2002 MEDIATION

25 At the 2004 evidentiary hearing, the parties submitted testimony from several
26 witnesses concerning the negotiations at the 2002 Dallas mediation session. Also admitted
27 into evidence at the hearing was the transcript of notes taken by Ronele McCurdy during the
28 Dallas mediation. McCurdy stated that she took notes at Don Fausset's request during the

1 EWA-ALPA effects bargaining sessions, from August 2001 through February 2003. McCurdy
2 Depo. at 50-53. McCurdy testified that Fausset had asked her “to get all the notes down that I
3 could, and to be representative of both sides of the table, and to make sure I put no emotion in
4 the notes, but to write it like I heard it.” McCurdy Depo. at 27. McCurdy stated that she had
5 attempted to take down the exact words that were spoken, though her notes were not a
6 verbatim transcript. McCurdy Depo. at 66. The hand-written notes and the typed transcript
7 were authenticated by McCurdy at her deposition, and EWA placed the transcript into
8 evidence at the evidentiary hearing without objection by ALPA.³

9 According to Fausset, Migliore indicated during the Dallas negotiations that
10 approximately 150 to 160 pilots had advised that they didn’t believe ALPA had authority to
11 settle on their behalf, and that they intended to proceed to arbitration. Fausset recalled stating
12 several times in Dallas that EWA was seeking a “global settlement” – by which he meant “total
13 effects bargaining” or “the elimination of the labor agreement, all grievances, all arbitration
14 opportunity, waivers regarding the pilots’ rights to sue, et cetera.” Fausset Depo. at 45-51.⁴

15 Migliore raised the issue in the Dallas negotiations of ALPA’s authority to enter into a
16 settlement of grievances on behalf of the entire pilot group. Exh. D-1 at 11-0251 to 11-0254.
17 Both Fausset and Kline testified that Migliore was nervous about putting ALPA at risk of a
18 lawsuit by the pilot members of ALPA. Fausset Depo. at 40-47; Tr. at 278-284 (Kline).
19 Migliore recalled that the parties discussed waivers of litigation – but only waivers of
20 grievances, not waivers of outside claims such as tort cases or state statutory whistle-blower
21 cases. Tr. at 384-86 (Migliore).

22 Haddock recalled only a brief discussion of the waiver issue in Dallas. He testified that
23 ALPA had been prepared to reach an agreement that included termination of the CBA
24

25 ³ The transcript of the notes from the February 2002 Dallas session was admitted as Exh.
26 D-1 at 11-0250 to 11-0270.

27 ⁴ Fausset made clear, however, that while he had full authority to settle the contract issue,
28 he couldn’t “settle” a “legal issue” such as the effect of a waiver. Thus, he indicated during the
Dallas session that it was important to obtain legal counsel before he agreed to any waiver
language. Fausset Depo. at 49-72.

1 between EWA and ALPA, but not one that included waivers of grievances and civil litigation
2 against EWA. He didn't recall ALPA abandoning its position with regard to opposing waivers
3 as a condition of settlement in Dallas. Haddock Depo. at 24-30.

4 The parties did not reach any binding agreement in the Dallas mediation session.
5 There was no agreement regarding monetary settlements or the terms of any waiver or
6 release. Tr. at 168, 277 (Kline).

7 **THE PERIOD OF TIME FOLLOWING THE FEBRUARY 2002 MEDIATION**

8 Arbitrator Harris issued a final decision on December 3, 2002. He found that the
9 August 2001 furlough of EWA's pilots was caused by circumstances beyond EWA's control,
10 and that while EWA had violated the furlough notice provision, EWA had not violated the CBA
11 itself when it furloughed its flight crew members. He awarded ALPA \$1.2 million, limited to the
12 August 2001 grievance.

13 After the issuance of the arbitration award, Kline discussed other pending issues with
14 Migliore and Granoff. Fausset testified that Kline called him after the February 2002
15 mediation session and told him that Granof was interested in finding out whether the money on
16 the table in Dallas – somewhere between \$17 and \$30 million – was still available. Fausset
17 Depo. at 101-104. According to Kline, Granof asked whether EWA wanted to resume
18 negotiations, and whether EWA was prepared to put on the table the proposal originally made
19 in Dallas – \$25 million. Tr. at 171-172 (Kline).

20 Granof testified that he and Kline had ongoing conversations regarding the resumption
21 of attempts to settle the shutdown grievance. Kline advised Migliore and Granof that EWA
22 sought as a precondition for any global settlement that there be a waiver and release of all
23 claims against EWA. Kline told Granof, "We would want some form of waiver." Granof Depo.
24 at 43-51. According to Kline, EWA wouldn't agree to a specific amount of money at that point,
25 but was interested in further negotiation. He stated that both Migliore and Granof were
26 receptive to the idea of a waiver and release, although neither of them "committed" to such a
27 condition. Tr. at 174-175 (Kline).

28 Kline recalled a conversation with Migliore in December 2002 or January 2003,

1 regarding “the various preconditions that the parties were so interested in as the predicate to
2 getting into the February mediation.” They discussed the waiver and release issues, and
3 Kline suggested to Migliore that there be a specific waiver and release for ALPA spelled out.
4 According to Kline, he made this proposal because both EWA and ALPA were intent on
5 constructing an agreement that would end the litigation to the extent possible, and would
6 provide for a full waiver for any future claims, and because both sides had to consider that
7 there might well be a duty of fair representation (“DFR”) lawsuit as a result of any settlement
8 that was reached. Tr. at 229-230 (Kline).

9 Granof understood that EWA was worried about lawsuits, and didn’t want the pilots to
10 get money from a settlement and then use that money to fund litigation. By “waiver,” Granof
11 understood Kline to mean “the kind of settlements that I had been typically involved in” – that in
12 return for the company paying a pilot to settle the grievance, the pilot would agree to drop any
13 ongoing lawsuits or grievances. It would be up to each pilot to agree to participate in the
14 grievance settlement, and any pilot that refused to dismiss all other complaints and grievances
15 would in effect opt out of the settlement, but could continue with other statutory claims and also
16 would be entitled to pursue the grievance. When Granof discussed the waiver issue with Kline
17 in January 2003, he believed that they were speaking about the “typical” settlement with
18 waiver. According to Granof, this was not the type of waiver and release that EWA eventually
19 demanded. Granof Depo at 51-53, 73-74.

20 THE FEBRUARY 2003 MEDIATION

21 The parties agreed to meet for a one-day mediation session at the Westin St. Francis
22 Hotel in San Francisco, California, on Wednesday, February 5, 2003, with mediator
23 Magdalena Jacobsen. According to Kline, the parties chose Jacobsen because she knew
24 the parties, the agreement, and EWA and its related corporate structure, and also because
25 she was at the National Mediation Board at the time of the previous arbitration. Both Kline
26 and Migliore were interested in having a neutral third party in the negotiations, partly because
27 Migliore had expressed concerns over a possible DFR suit. Tr. at 175-177 (Kline).

28 EWA was represented by Fausset, EWW’s former CEO; Kline and Marshall, attorneys

1 for EWA; Grant, attorney for EWW; and Kierce, the administrator of the collective bargaining
2 agreement between ALPA and EWA. ALPA's lead negotiator was Attarian, Executive
3 Assistant to ALPA President Woerth. The other ALPA representatives were Haddock,
4 Custodian for the Emery Pilots; ALPA attorneys Granoff and Migliore; and Englert, Senior
5 Economic Analyst for ALPA. Also present was McCurdy, who took notes at Fausset's
6 request.⁵

7 According to Attarian, the issues to be considered at the February 5, 2003, session
8 were the shut-down grievance, whether the ALPA-EWA CBA should be terminated, and
9 whether the ALPA-EWA bargaining relationship should be terminated. Tr. at 44-45 (Attarian).
10 Attarian later testified that the negotiators bargained over the shutdown grievance, which
11 included negotiation of the termination of the collective bargaining agreement and the
12 collective bargaining relationship between ALPA and EWA. He also testified that they
13 negotiated the amount of the monetary settlement, and agreed that ALPA would determine the
14 allocation of the settlement funds to the individual pilots. In addition, ALPA sought a right to
15 re-employment for former EWA pilots in the event that EWA or any of its affiliates started up a
16 new airline within a specified period of time. Tr. at 47-59, 65-69 (Attarian).

17 Attarian also recalled that the parties discussed whether, as a condition of receiving a
18 distribution of the settlement monies, the individual pilots would be required to execute a
19 personal litigation waiver and release. He was aware that there would have to be a waiver
20 and release negotiated by both parties, which was also acceptable to ALPA, and he was
21 aware in general terms of the scope of the proposed waiver and release, but also stated that
22 he was not a party to those particular negotiations. Tr. at 52-53, 69-70 (Attarian).

23 Attarian knew, prior to the February 5, 2003, mediation, that the waiver and release
24 issue was something that had to be resolved and satisfied. Attarian believed that if the issue
25 of the waiver remained open and unresolved, it would not satisfy the terms and conditions of
26 the agreement until it had been negotiated successfully and legally reviewed. He believed that

27
28 ⁵ McCurdy's transcription of her notes from the February 2003 San Francisco session was
admitted as Exh. D-1 at 11-0235 through 11-0270.

1 Woerth was aware of the magnitude of the waiver and how carefully it would have to be
2 constructed. He didn't recall any specific conversation with Woerth regarding the waiver,
3 although Woerth did charge Attarian with making sure ALPA was legally protected, so ALPA
4 would not be exposed to litigation. Tr. at 87-97 (Attarian).

5 Settlement Authority

6 Fausset was the chief spokesperson for EWA, and the only EWA representative with
7 settlement authority. He stated, however, that he always needed approval for any settlement
8 that went beyond his "parameter," although he did not describe that "parameter." He asserted
9 that both he and Attarian said they had full authority to settle, and he believed this authority
10 existed regardless of any written statement that a settlement agreement would require the final
11 approval of the president of EWA and the president of ALPA. He also claimed that many
12 agreements in mediation are reached on a handshake. Fausset Depo. at 109-114.

13 Kline also testified that Fausset was lead negotiator for EWA and had full authority to
14 agree to a settlement that day. Tr. at 180-181 (Kline). Fausset represented EWA in the
15 negotiations with ALPA over money issues. Kline was not personally present for any
16 negotiations between the ALPA representatives and the EWA representatives concerning
17 money issues. Tr. 191-92 (Kline).

18 Attarian was the lead negotiator for ALPA. Both Attarian and Woerth described
19 Attarian as Woerth's "right-hand man." Tr. at 35-36 (Attarian); Woerth Depo. at 27. Woerth
20 testified that Attarian's authority was to work on projects and take them as far as they could go
21 in negotiations. However, Woerth never delegated to Attarian the power that is reserved for
22 the president of ALPA. Woerth Depo. at 66.

23 Woerth recalled no specific discussions with Attarian regarding his authority for
24 negotiations prior to the February 5, 2003 mediation session. Although Woerth sent Attarian
25 to San Francisco without a dollar target, he believed that the senior pilots had to get at least
26 \$100,000 each or "the deal wouldn't go." Woerth Depo. at 21-26. Attarian says that for the
27 February 2003 negotiations, he was just told to do a "good job" and not given a monetary
28 target or floor. Tr. at 38-39 (Attarian).

1 According to Attarian, he had the authority to bring the terms and conditions to a
2 successful conclusion, to bring a proposal back to ALPA in Washington, D.C. Tr. at 107
3 (Attarian). He testified that although he stated that in Dallas in 2002, and in San Francisco in
4 2003, that "I always have the authority vested by the president to do the deal," this authority
5 was subject to bringing the deal back to the president for his final review and signature. He
6 emphasized that no one at the mediation had the authority to bind ALPA to an agreement –
7 only the president of ALPA could sign for ALPA. Tr. at 98-99 (Attarian). "It's in our
8 constitution." Attarian never told Jacobsen or any EWA representative that he had the
9 authority to agree to a final settlement without the final authority of Woerth. Tr. at 107-112
10 (Attarian).

11 Migliore confirmed that Attarian had said he had the authority to proceed and get the
12 deal done, and take it back to the president. Tr. 423 (Migliore). Migliore also agreed that
13 under ALPA's constitution and bylaws, it is always the president's decision whether or not to
14 approve a settlement. Tr. at 404, 412 (Migliore). He did not believe that this requirement that
15 the president of ALPA sign any agreement was simply a "ministerial" matter. Tr. 387-389
16 (Migliore).

17 Englert recalled that during the first meeting between Jacobsen and the ALPA
18 representatives, "it was stated" that for ALPA to negotiate a final and binding agreement, the
19 agreement would have to be approved by Woerth. Englert Depo. at 50.

20 Granof concurred that under the ALPA constitution and bylaws, there could be no final
21 and binding settlement unless and until Woerth, ALPA's president, had reviewed the
22 agreement, it had been submitted to him with appropriate staff work, and he had signed off on
23 it. Granof likened the process to negotiating a collective bargaining agreement – "You get a
24 tentative agreement or settlement of whatever, but it's not final and binding until, even if it's
25 reduced to writing and you know it's TA'd, until the president signs off on it." Granof Depo. at
26 56-57.

27 According to Granof, when Attarian said, "I have the authority to get the deal done," he
28 conveyed the impression that he had the authority, that Woerth had confidence in him, and that

1 his recommendation to Woerth would carry considerable weight. Granof believed that
2 Attarian was most concerned about money, and that he was saying, essentially, that he
3 wanted EWA to come forward with a realistic offer so they could move forward. If EWA did
4 that, Granof felt that Woerth had sufficient confidence in Attarian that, after legal review and
5 proper staff review, the deal would likely be done. Granof Depo. at 85-87.

6 Kline also testified that Attarian stated during the session that he had the “authority to
7 get the deal done” or “full authority to reach a deal.” However, while Kline was aware of the
8 provision in ALPA’s constitution that only the president of ALPA had the authority to approve
9 agreements, he stated that he believed nonetheless that if Attarian said he had authority, then
10 he did, on behalf of the president. Tr. at 181-182; 284-289 (Kline).

11 Jacobsen testified that she believed that any agreement reached by ALPA with EWA
12 would have to be approved by Woerth. Jacobsen Depo. at 95.

13 Morning Session

14 The mediation convened at 9:45 a.m. on February 5, 2003. The two groups of
15 negotiators remained in separate rooms for most of the morning, and Jacobsen moved
16 between them. McCurdy’s notes reflect that although the parties discussed the monetary
17 issues in general terms, neither side made a specific monetary demand or offer during that
18 morning session. Exh. D-1 at 11-0239 to 11-0246.

19 Fausset described the morning session as a “back and forth” with no concrete offer.
20 He stated that ALPA started at \$50 million, then came down to \$30-\$35 million, while at the
21 same time, EWA was at about \$14 million. Fausset Depo. at 114-116.

22 Englert recalled that Jacobsen came into the ALPA room on the morning of February
23 5, and stated that EWA was at less (in terms of a monetary figure) than they had been in the
24 Dallas mediation. According to Englert, everyone in the ALPA room “was just beyond
25 disbelief.” Englert Depo. at 14-15.

26 Granof testified that during their first meeting with Jacobsen, the ALPA representatives
27 discussed the number of pilots that ALPA felt might be eligible to participate in any severance
28 funds that would be negotiated, and the effect of the decision by Arbitrator Harris. According

1 to Granof, a number of pilots “felt that they should be compensated for their entire careers” –
2 an amount in the range of \$180 to \$200 million. Those pilots considered the range ALPA was
3 talking about – \$30 million – to be “chump change.” Thus, according to Granof, ALPA was
4 concerned that the pilots might sue ALPA for violating the duty of fair representation by
5 entering into a settlement that was far too low. He didn’t think this was an attempt to address
6 the Burley issue – the issue raised by the Supreme Court’s ruling in Elgin, J. & E. Ry. Co. v.
7 Burley, 325 U.S. 711 (1945) (“Burley”) (union cannot settle grievance under Railway Labor Act
8 without consent of individual employees) – which was separate. Granof Depo. at 64-75.

9 Granof also believed that the ALPA representatives were trying to convey that any
10 settlement should be enough to get all but a small number of the pilots to participate and to
11 agree to finality. He did not recall any discussion with Jacobsen of what would happen to
12 pilots who decided not to accept the settlement and what their rights would be. He knew that
13 subject had been addressed in Dallas, but didn’t recall it being addressed in San Francisco.
14 Granof Depo. at 69, 73-74.

15 In Granof’s view, the main issue preventing settlement was the amount of money. He
16 felt that if the parties could not come to grips with the money issue, then there was no point in
17 discussing the other elements of the settlement. He said that the Burley issue and the waiver
18 issue had been previously discussed, and had been left unresolved. He reiterated that there
19 had been previous discussions with Kline about a waiver, but that what the company ultimately
20 demanded was not what he (Granof) had thought they meant by the traditional “waiver.”
21 Granof Depo. at 79-81.

22 First Group Meeting

23 According to McCurdy’s notes, the ALPA representatives joined Jacobsen in the room
24 with the EWA representatives at 12:30 p.m., where the parties engaged in a somewhat
25 heated discussion until 12:57 p.m. Exh. D-1 at 11-0243 to 11-0246; see also Haddock Depo.
26 at 12-13, 109; Fausset Depo. at 116. The ALPA representatives then left the room. The
27 parties broke for lunch from 1:00 p.m. to 2:27 p.m.

28

Afternoon Session – EWA’s First Offer

The session reconvened at 2:27 p.m., with the two negotiating teams again in separate rooms. According to McCurdy’s notes, Jacobsen met with EWA representatives from 2:27 p.m. to 2:35 p.m. Exh. D-1 at 11-0246 to 11-0247. At that point, Fausset authorized Jacobsen to convey to ALPA an offer of \$21.2 million – consisting of \$20 million in “new money” in addition to the \$1.2 million from the Harris arbitration award. Id.; Fausset Depo. at 117-118.

Fausset also gave Jacobsen a draft settlement document to convey to ALPA along with the \$20 million offer. The draft settlement document consisted of a three-page document entitled “Final Settlement Agreement Between Emery Worldwide Airlines, Inc. and the Airline Pilots Association, International,” and a two-page document entitled “Settlement Agreement/ Waiver and Release.” Exh. D-3. According to Kline, if ALPA had agreed to the waiver/ release language, the shutdown grievance would have been dismissed, and any pilot that refused to sign the waiver and release would have received no money from the settlement, and some or all of that pilot’s share of the settlement funds would have gone back to EWA. Kline testified that the release was a material term of the settlement. Tr. at 303-312 (Kline).

Grant, who had not been present for the morning session, did attend the afternoon session. He stated that Fausset made a “series of offers” to resolve all outstanding issues between EWA and ALPA. The first offer from EWA was \$20 million. Grant recalled that a settlement document was given to Jacobsen in conjunction with the monetary offer, part of EWA’s offer designed to resolve all outstanding issues. Grant always understood there were two components to the agreement – the agreement itself and a generic individual waiver. Grant Depo. at 47-53.

McCurdy’s notes reflect that as Fausset handed the draft settlement document to Jacobsen, he told her, “We also expect them to sign a full release that Sheldon [Kline] has put together. It is very important to us. We understand there needs to be some tweaking between the parties.” Exh. D-1 at 11-0247.

McCurdy’s notes do not indicate, however, that the EWA representatives explained to

1 Jacobsen that the document required a dismissal of outside lawsuits before flight crew
2 members would be eligible to receive payment from a settlement of the shutdown grievance.
3 In addition, Kline testified that he never explained the terms of the settlement and release to
4 Jacobsen, and that he did not explain the relationship of waiver to any outside litigation the
5 pilots might have. Tr. at 302 (Kline).

6 Grant also testified that the EWA representatives did not discuss the settlement
7 document or the terms of the release with Jacobsen in any detail, but rather that they simply
8 told her they were offering the \$20 million and the release document – “We gave her the
9 release document, and essentially said that was part of the deal.” He noted that Jacobsen did
10 not come back to them later and say there were any problems with the substantive terms.
11 Grant Depo. at 117-118.

12 McCurdy’s notes reflect that before leaving the EWA meeting room at approximately
13 2:35 p.m., Jacobsen told Fausett that if the ALPA negotiators found EWA’s monetary offer to
14 be “in the ballpark,” they would need to discuss it with ALPA’s president. Fausset responded
15 that Attarian had said that if the offer was reasonable to him and to Haddock, then they would
16 take it to Woerth and he would sign off on it. Exh. D-1 at 11-0247.

17 Kline also testified that he had asked Jacobsen to give a copy of the draft settlement
18 document to ALPA on February 4 (the day before the mediation),⁶ but that she had declined,
19 telling him to give her the document the next day. Kline then decided to give the document to
20 ALPA directly. He claimed that he telephoned Migliore on the evening of February 4 and
21 asked to see him, and that he then delivered the document directly to Migliore in his hotel
22 room. Tr. at 177-180 (Kline).

23 Communication of EWA Offer to ALPA

24 Migliore disputed Kline’s version of events. He testified that he first received the draft
25 settlement document on February 5 from Jacobsen, that he did not receive a copy of the
26

27 ⁶ McCurdy’s notes reflect that Jacobsen met with the EWA representatives from 2:45 p.m.
28 to 4:05 p.m. on February 4, 2003. Exh. D-1 at 11-0235 to 11-0238. According to Kline, the
purpose of the meeting was to allow the EWA team to brief Jacobsen on the issues. Tr. at 178-
179 (Kline).

1 document from Kline the previous evening, and that Kline did not come up to his room or call
2 him the previous evening. He said Jacobsen handed him a copy at about 2:30 p.m. on
3 February 5, when she came up to ALPA's caucus room. He recalled her saying, "Marcus, this
4 is for you and the lawyers. This is from Sheldon [Kline]. It's a rough draft. And you obviously
5 are going to need to talk about it, and do further work on it." He also stated that Jacobsen
6 brought in a monetary offer at the same time, but that she did not say that the monetary offer
7 was contingent on ALPA accepting the draft settlement document without any changes.
8 According to Migliore, when he received the draft document, he "glanced at it relatively
9 quickly." Tr. at 389-392 (Migliore).

10 Attarian recalled that when Jacobsen brought up EWA's initial offer of \$20 million in
11 new money, she also had what Attarian refers to as the "rough draft waiver documents that
12 she'd been instructed to give to Marcus [Migliore] from Sheldon Kline." The draft document,
13 which contained the waiver and release language, was handed to "one of our attorneys."
14 Attarian was not handed the document and did not know exactly what it said. He stated that
15 there were no copies made. Tr. at 69, 113-114 (Attarian).

16 According to Attarian, Jacobsen did not say that the \$20 million in new money was
17 conditioned on the specific release and waiver terms contained in the draft document that she
18 gave Migliore. He recalled her saying only that the document came from Kline, who wanted
19 Migliore to have it, that it was a rough draft of the waiver language, and that the lawyers were
20 going to have to work on it. Tr. at 89-90, 114 (Attarian).

21 Granof knew nothing about any document having been delivered to ALPA on February
22 4. He understood that Jacobsen had delivered the draft settlement document on the afternoon
23 of February 5. The first time Granof actually saw the document was when Migliore showed it
24 to him, towards the end of the day on February 5. As far as Granof knew, the settlement
25 document was not discussed between ALPA and EWA. Granof Depo. at 92-94.

26 The only document Haddock recalled ALPA receiving from EWA on February 5 came
27 as a draft agreement brought in by Jacobsen around 3:00 p.m. Jacobsen said the document
28 had been prepared by EWA, by Sheldon Kline. Haddock did not go through the entire

1 document himself; instead, he looked over Migliore's shoulder during the first half-hour after
2 they had received the document. "Marcus had it in his possession, and there were a couple of
3 issues that he was reading through that I looked at." He recalled that Migliore might have
4 "scribbled" something on the document. He had never previously seen the document, and was
5 not aware of anyone making any copies. Haddock believed Migliore may have taken the
6 document to a meeting with Grant late in the day. Haddock Depo. at 30-36.

7 ALPA Representatives' Phone Call to Woerth

8 Hotel phone records produced in discovery show that the ALPA negotiating team
9 placed a long-distance telephone call to the Washington D.C. home of ALPA President
10 Woerth at 3:06 p.m. Exh. P-40; see Tr. at 447 (Migliore); 83-84 (Attarian). Attarian testified
11 that all the members of the ALPA negotiating team were present in the room at the time of the
12 call. Jacobsen was not present. Tr. at 74, 120-121 (Attarian).

13 Woerth recalled that the ALPA negotiators telephoned him on the evening of February
14 5, shortly after he arrived home. He did not recall receiving any calls that morning from
15 Attarian, or any calls later in the day while he was still at his office. He could not recall the
16 exact time of the call, but stated that he had just arrived home. The call lasted between 15 and
17 30 minutes. There were multiple parties on the line, on the speaker phone. Woerth Depo. at
18 12, 46-47.

19 Woerth recalled discussing a settlement amount of \$23.8 million, and the subject of re-
20 employment rights in the event the airline started up again. He said Haddock was particularly
21 concerned about re-employment rights. With regard to the monetary settlement, Woerth's
22 concern was that the senior captains each get at least \$100,000. He didn't "approve" any
23 particular settlement amount, but rather "considered the whole thing as an update." Woerth
24 Depo. at 13, 53-57.

25 Migliore told Woerth that he had received a document from EWA, but it was not clear to
26 Woerth from whom the document had come. According to Woerth, Migliore said he had just
27 started to review it, and that there was "all kinds of stuff in here I don't understand why it's
28 here." Migliore hadn't yet reviewed the document thoroughly, but felt there were problems with

1 EWA trying to get ALPA involved in “stuff that’s outside our collective bargaining area.”
 2 Woerth was concerned about anything that might put ALPA at risk. He recalled telling Migliore
 3 not to do anything to make matters worse for ALPA. “[M]y instructions to Marcus [Migliore]
 4 were absolutely make sure that the institution is protected, . . . and we don’t make matters
 5 worse for ALPA by entertaining even in the remotest manner anything that doesn’t pertain to
 6 this shutdown grievance.” Woerth Depo. at 50-56.

7 According to Woerth, the ALPA negotiators told him they would give him an update
 8 later; no one told him during the call that the parties had reached agreement on anything. “We
 9 hadn’t reached agreement on money. We hadn’t reached agreement on entanglements of
 10 other litigation. We hadn’t reached agreement on the terms of a startup airline or of all the
 11 open issues.” Woerth Depo. at 53. Woerth concluded after the February 5 telephone call that
 12 the ALPA representatives were only going to try to button down a monetary amount of \$25
 13 million, and that “the rest wasn’t even solvable” in San Francisco. Woerth Depo. at 68-69.

14 Attarian recalled that the call was placed to Woerth in his home in Washington, D.C.
 15 late in the afternoon, and that it lasted approximately 20-25 minutes.⁷ The call originated from
 16 ALPA’s hotel meeting room, and the ALPA representatives told Woerth (over the speaker-
 17 phone) that a \$25 million figure had been discussed, plus waiver and start-up issues. Attarian
 18 told Woerth that amount would give the senior pilots approximately \$100,000 in settlement,
 19 which Attarian felt represented “real money” or “true value” or “meaningful economic support
 20 for pilots” or “real money in the pilots’ pockets.” Attarian recalled that Woerth said “good job”
 21 about the \$25 million figure. Woerth thought the \$25 million figure “met the test” – i.e., was
 22 sufficient to meet the obligation to the pilots so there would be no future DFR litigation issues.
 23 Tr. 72-80 (Attarian). Attarian couldn’t recall whether EWA had made any monetary offer as of
 24 the time of the phone call, just that the first monetary offer was made mid-afternoon. Tr. at 84-

25
 26 ⁷ At the evidentiary hearing, Attarian stated that he had testified in his deposition that the
 27 ALPA representatives had made two calls to Woerth on February 5, 2003 – one in the morning,
 28 and a “more substantive” one late in the afternoon, at approximately 5:30 p.m. or 5:45 p.m.
 However, when presented at the hearing with the hotel’s record of the telephone calls made from
 his hotel room, Attarian agreed that a call had been made to Woerth at 3:06 p.m. Tr. at 72, 81-84
 (Attarian).

1 86 (Attarian).

2 Attarian recalled that Haddock explained to Woerth what would happen if EWA started
3 up a new airline. The team also discussed the final settlement documents provided by
4 Jacobsen, and Woerth said he did not want ALPA exposed to lawsuits because of the waiver
5 documents. Woerth also said he wanted the issue involving the restart of the airline to be
6 negotiated because he didn't want litigation over that issue. Tr. at 73-78 (Attarian).

7 According to Attarian, Woerth did not approve the settlement of the shut-down
8 grievance, did not approve the draft settlement documents, and did not approve the
9 waiver/release in the draft settlement documents. Attarian stated that one of many concerns
10 was that EWA's proposed waiver/release would require any pilot to dismiss outside litigation
11 before receiving settlement money. Tr. at 122-124 (Attarian).

12 Haddock recalled that Attarian started the conversation, making some initial comments
13 regarding other business. He reviewed what had happened at the Dallas session in 2002,
14 and told Woerth about EWA's current monetary offer. According to Haddock, ALPA hadn't
15 made a firm monetary proposal prior to the call to Woerth. The figure the ALPA
16 representatives discussed with Woerth was \$23.8 million in "new money." Haddock recalled
17 that ALPA made that monetary proposal after the telephone call. Haddock Depo. at 45-46,
18 115.

19 Haddock recalled that the ALPA representatives decided to stick with \$23.8 million
20 "new money" plus \$1.2 million old (Harris award) as the bottom line. He believed that Woerth
21 was deferring to the judgment of the negotiating team as to what was attainable in terms of
22 money. Woerth said they should put it all together and he would look at it. Haddock Depo. at
23 46-49.

24 Haddock recalled discussion of the start-up, which was a concern in the pilot group.
25 Haddock favored going into the next contract period – 2007 – and Granof or Migliore
26 suggested that the agreement should include affiliates of CNF. Haddock Depo. at 47-48.

27 According to Haddock, the remainder of the discussion related to potential DFR issues
28 for ALPA regarding waivers of rights for pilots in connection with current or pending lawsuits

1 and current grievances. Haddock was less concerned about potential DFRs and more about
2 individuals in the pilot group being able to pursue their own paths outside the CBA, because
3 he knew there were several pending grievances. Haddock Depo. at 49-51.

4 Haddock also recalled a lengthy discussion of the Burley issue – which he described
5 as “the union’s ability to give up the rights of individuals to litigate against the company.”
6 According to Haddock, Migliore stated that he was not prepared to tell the EWA
7 representatives that ALPA would make an agreement without review by his boss and also by
8 outside counsel. Woerth responded, “Well, you [Attarian] and Gene [Granof] need to do it,”
9 adding that the attorneys – Migliore and Granof – needed to make sure there was no liability
10 for ALPA. According to Haddock, Migliore said, after a brief review of the draft settlement
11 document, that there might be some Burley issues that ALPA might not be able to overcome,
12 and he wouldn’t know until further legal review. Woerth reiterated the importance of ensuring
13 that any final agreement not subject ALPA to a DFR suit or other litigation. Haddock Depo. at
14 52, 57, 117-121.

15 Haddock said Migliore briefly discussed pending lawsuits. Haddock Depo. at 53-55.
16 Haddock distinguished between “current” lawsuits and “pending” lawsuits, noting that there
17 were two “current” lawsuits – one called the “California lawsuit” (a whistleblower suit) and the
18 other a WARN Act suit in Ohio – and that there was also a “pending” lawsuit, which might be
19 filed any day – the Del Turco lawsuit. Haddock Depo. at 117.

20 Haddock recalled Granoff stating that the timing of the arbitration was something that
21 ALPA should consider in trying to reach a settlement with EWA – that it was better to settle for
22 something reasonable today than litigate for something that might be increased down the
23 road. However, Haddock didn’t recall Granoff saying anything regarding waivers or review
24 discussed by Migliore. Woerth complimented the team on their efforts, though Haddock didn’t
25 recall compliments on results achieved thus far. Haddock Depo. at 57-58.

26 Migliore testified that Woerth and the ALPA team discussed whether a \$25 million total
27 settlement would be sufficient from the standpoint of defending against a DFR action.
28 Migliore told Woerth that he thought ALPA had a stronger case with regard to the permanent

1 shutdown grievance than it had for the temporary shutdown grievance. Tr. at 392-395
2 (Migliore).

3 Migliore also recalled that Woerth and the ALPA team discussed EWA's draft
4 settlement document. Migliore told Woerth that Jacobsen had given them four or five single-
5 spaced, tightly packed pages of material that he (Migliore) had only had time to glance at
6 quickly, and that it was obvious that "there were going to have to be serious issues of review
7 necessary" with respect to the document, in particular by the chief counsel of ALPA, and by
8 outside counsel. Migliore understood Woerth to be concerned that ALPA be protected from
9 pilots who might file suit against ALPA. Woerth told the ALPA representatives he would leave
10 it to the lawyers to work out. Tr. at 395-399 (Migliore).

11 Granof heard the conversation from both ends, along with Migliore, Haddock, and
12 Englert.⁸ He recalled that the focus of conversation was on money – that with the "new money"
13 plus the arbitration award, the total monetary settlement would be \$25 million.

14 Either Englert or Attarian stated that the settlement would put as much as \$100,000 in
15 the pockets of the individual pilots – perhaps more in cases of senior pilots – and even to the
16 less senior pilots the amount could be \$80,000 or \$90,000. Granof recalled some discussion
17 about the possibility of EWA restarting the airline, and an agreement that if airline was
18 restarted in 2004, the CBA would be reinstated. He recalled a suggestion from someone that
19 the date be extended to 2007. Granof Depo. at 106-109.

20 Granof also recalled that Migliore explained to Woerth that the waiver issue had not all
21 been settled, and that it was an issue that probably had to be worked out, primarily between
22 the lawyers, if there was going to be a settlement. Granof stated that Migliore did not minimize
23 the issue, and that Woerth's response was, "Okay, but be sure that whatever you do that ALPA
24

25 ⁸ Granof recalled that the phone call to Woerth occurred a short time after Jacobsen
26 conveyed EWA's acceptance of ALPA's monetary demand. Granof Depo. at 106. According
27 to McCurdy's notes and the testimony of the participants, EWA agreed to the \$23.8 million
28 settlement amount at approximately 5:30 p.m. As Woerth stated he received only one phone call
on February 5 from the ALPA negotiators, Woerth Depo. at 46-47, 56-57, and no other witness
testified to there having been more than one phone call to Woerth, the court concludes that Granof
was mistaken in his recollection of the timing of the call.

1 is protected.” Granof didn’t think the actual settlement document was discussed, and was not
2 certain whether Migliore mentioned they had received such a document. He stated, however,
3 that there was no discussion of its specific terms or provisions. Granof Depo. at 108-109.

4 Englert was present during the call to Woerth, although he was occupied with the
5 computer. According to Englert, Woerth said, “Do the best you can and keep us legal.”
6 Englert recalled a discussion about what would happen were an airline to be restarted, and
7 also recalled a reference to review by outside counsel, in connection with the document
8 Jacobsen had brought in. Englert Depo. at 30-34, 53-54.

9 ALPA’s “Counterproposal”

10 Kline testified that at around 3:30 p.m., he received a “counterproposal” from Migliore
11 to the “final settlement agreement” (referring to the draft settlement document that EWA had
12 previously provided to ALPA). He stated that he and Fausset met with Migliore at Jacobsen’s
13 request, and that Migliore proposed a change in the draft settlement proposal. According to
14 Kline, Migliore sought to change the provision, “Should EWA or CNF establish another Part
15 121 air carrier prior to September 18, 2004, such carrier shall offer employment as pilots to
16 [individuals on EWA Pilot Seniority List],” to read, “Should EWA, CNF, or any subsidiary
17 thereof establish another Part 121 air carrier prior to September 18, 2007, such carrier shall
18 offer employment as pilots to [individuals on EWA Pilot Seniority List].” Tr. at 183-184 (Kline).

19 Kline claimed that Migliore stated that this provision came directly from Woerth, was
20 “virtually nonnegotiable,” and was very important to Woerth, and that if EWA didn’t agree to
21 make those changes, it didn’t matter what the money was. According to Kline, Fausset
22 subsequently received approval for that proposal from Schmoller, CNF’s general counsel.
23 Kline then called Migliore in the ALPA suite and told him they agreed. Tr. at 184-188 (Kline).

24 Migliore disputed Kline’s account, asserting that this meeting never took place. He
25 testified that the ALPA representatives at some point gave the EWA representatives “a
26 heads-up that this [issue] was a concern,” through Jacobsen, and claimed that the agreement
27 regarding re-employment rights “was essentially tied down” at the 2-on-2 meeting that
28 occurred some time after 5:45 p.m. (discussed below). Tr. at 414-416 (Migliore).

ALPA's Monetary Proposal and EWA's Response

EWA's next meeting with Jacobsen was at 3:45 p.m. According to McCurdy's notes, Jacobsen conveyed ALPA's monetary demand – a total of \$25 million, or \$23.8 million in “new money,” plus the \$1.2 million Harris award. Jacobsen noted that this amount was a little above \$55 thousand per employee, adding, “This is after going to the mountain. That will button it up.” Exh. D-1 at 11-0247.

Both Fausset and Kline recalled this meeting, in which Jacobsen conveyed ALPA's offer to settle for \$23.8 million in “new money.” Fausset Depo. at 118; Tr. at 192, 218-219 (Kline). The entire EWA bargaining team was present. Tr. at 192 (Kline). In Kline's view, Jacobsen's statement, “This is after going to the mountain,” could be interpreted only as meaning that the ALPA team had obtained the number from Woerth. Up to that point, according to Kline, EWA had never officially offered as much as \$23.8 million in settlement of the parties' disputes. Kline added, however, there had been an off-the-record proposal in the Dallas mediation, to settle everything for \$25 million. Tr. at 219-220 (Kline).

According to McCurdy's notes, Jacobsen left the EWA meeting room at 3:49 p.m., and was called back in by Fausset at 4:03 p.m. Exh. D-1 at 11-0247. Jacobsen then met with the EWA representatives from 4:03 p.m. to 4:09 p.m. During this meeting, Fausset authorized Jacobsen to convey an offer to ALPA of \$20.8 million in “new money” plus the \$1.2 million arbitration award. Exh. D-1 at 11-0247 to 11-0248. Jacobsen left the EWA room at 4:09 p.m. When she returned at 4:21 p.m., she asked Fausset to join her in the “woodshed.” Exh. D-1 at 11-0248; Fausset Depo. at 119.

“Woodshed” Meeting

According to McCurdy's notes, the “woodshed” meeting occurred between 4:21 p.m., when Jacobsen and Fausset left the EWA meeting room, and 4:28 p.m., when they returned. Exh. D-1 at 11-0248. Fausset first described the “woodshed” as a little conference room 25-30 feet on the left side of the corridor where Attarian and Fausset had met Jacobsen twice. Fausset then stated that there were actually three different “woodshed” meetings. The first such meeting occurred after lunch, in the hallway down from the little conference room. The

subject was “issues of money and the rest of the deal.” Fausset Depo. at 119-124.

In the second meeting – the one occurring between 4:21 p.m. and 4:28 p.m. – Fausset, Attarian, and Haddock met with Jacobsen. Fausset offered to “split the baby” – split the difference between the \$23.8 million and the \$20.8 million – but Attarian said, “No.” The third meeting was “when we shook hands and agreed on the 23.8.” Fausset Depo. at 120-127.

Attarian recalled that the “woodshed” meeting with Haddock, Fausset, and Jacobsen was short, maybe 5 minutes, and occurred after ALPA made the \$23.8 million counteroffer and before EWA agreed to the \$23.8 million. Attarian also stated that Fausset had tried to “split the baby” but that he (Attarian) would not agree. According to Attarian, no one discussed the draft settlement document or the waiver/release at this meeting. Attarian stated that he had no further meetings with Fausset or other EWA representatives. Tr. at 126-128 (Attarian).

Subsequent Proposals and Agreement on Monetary Figure

McCurdy’s notes reflect that at 4:28 p.m., Jacobsen and Fausset returned to the EWA room, where Jacobsen remained until 4:40 p.m. According to McCurdy’s notes, Fausset next offered \$22.8 million (in “new money”), and Jacobsen left the room at 4:40. See Exh. D-1 at 11-0248; Fausset Depo. at 127.

Attarian testified that he returned to the ALPA room following the “woodshed” meeting. He recalled receiving a telephone call from Jacobsen a few minutes later, asking what he would say to \$22 million (in “new money”). Attarian’s response was “Tell them ‘bye.’” Attarian recalled that the ALPA representatives received another call perhaps five minutes later, saying that EWA had met ALPA’s new money demand. Tr. at 129 (Attarian).

McCurdy’s notes and the testimony of other witnesses report a slightly different sequence. McCurdy’s notes show that from 4:40 p.m. to 4:42 p.m., Jacobsen met with the ALPA representatives, and at 4:42 p.m. returned to the EWA representatives’ room. Exh. D-1 at 11-0248. According to Fausset, Jacobsen reported that ALPA was holding firm at \$23.8 million. Fausset Depo. at 127-128. Jacobsen then left the room at Fausset’s request, Exh. D-1 at 11-0248; and the EWA representatives (Fausset, Kline, McCurdy, Kierce, and Marshall) had a caucus. Fausset stated that he was “in a tirade,” and was “pissed,” but that he reviewed

1 the future and pending litigation expenses, and decided the \$23.8 million was a good trade-off
2 for settling everything. He called Schmoller, who agreed. Fausset Depo. at 127-135.

3 Schmoller denied that Fausset had called to ask for approval – he claimed, rather, that
4 Fausset had called simply to run the \$23.8 million figure by him. Schmoller stated that he and
5 Fausset had a “long-standing relationship,” adding that “I’m kind of his mentor . . . the guy that
6 brought him into the company, into the headquarters part of it.” Schmoller Depo. at 11-12. He
7 said that Fausset called to tell him the parties could have an agreement if EWA went to \$23.8
8 million. Schmoller asked whether “the other stuff” was settled, and Fausset said it was.
9 Schmoller then said that Fausset should “do it.” Schmoller Depo. at 40-41.

10 McCurdy’s notes reflect that Jacobsen returned to the EWA room at 5:15 p.m., and met
11 with EWA representatives until 5:35 p.m. During that meeting, Fausett told Jacobsen, “We
12 agree to settle for \$23.8 million. We insist that anyone who participates signs a full release. I
13 think the attorneys can take over now.” At that point Jacobsen said, “They will want to talk to
14 [Woerth] about it, I am sure. The attorneys can take it from here. I will let them know. I have
15 Jeff [Haddock] and Howard [Attarian] come down.” Exh. D-1 at 11-0248 to 11-0249.

16 Migliore believed it was Jacobsen who informed the ALPA representatives that EWA
17 had come up to the \$23.8 million figure, but couldn’t recall whether she telephoned them or
18 came up to the ALPA meeting room. He did not recall her saying that EWA’s acceptance of
19 the \$23.8 million figure was contingent on ALPA accepting EWA’s draft settlement document
20 without any changes. Tr. at 399-400 (Migliore).

21 Attarian recalled that when Jacobsen called ALPA to say that EWA had accepted the
22 \$23.8 million counteroffer, she stated that the parties would have to engage in further
23 negotiations regarding the other details. Attarian said that Jacobsen also came up to the
24 ALPA room to deliver the news in person. He claimed that Jacobsen did not tell the ALPA
25 representatives that EWA’s acceptance of that figure was conditioned on the waiver; rather,
26 she said that the lawyers were going to work out the details. Attarian assumed that these
27 “details” were “the details of the rough document that contained the waiver release.” He
28 thought it was understood that this was “a piece of the business that was unfinished and an

1 issue that was unfinished.” Attarian believed that Jacobsen knew ALPA had to get approval
2 of ALPA’s president. According to Attarian, “one piece of the settlement was reaching the
3 monetary figure, which we had taken a long time to get to, and now the other issues certainly
4 had to be, you know, resolved.” Tr. at 99-100, 128-134 (Attarian).

5 Attarian testified that in the last conversation of the day between Jacobsen and the
6 ALPA representatives, Jacobsen did not say that EWA believed or that she herself believed
7 that ALPA had already agreed to EWA’s draft settlement document or the specific terms of
8 the settlement and release. Nor did she say that the company’s offer of \$23.8 million in “new
9 money” was conditioned on ALPA’s accepting the draft settlement document with no changes
10 or on ALPA’s accepting the specific terms of the waiver and release. Attarian did not tell
11 Jacobsen that ALPA was agreeing to the draft settlement document or to the waiver and
12 release contained in the document. Tr. at 132-135 (Attarian).

13 Granof believed that Jacobsen advised ALPA that EWA had accepted ALPA’s \$23.8
14 million “new money” demand, but couldn’t recall whether it was in person or on the phone. He
15 did not recall Jacobsen saying there were any conditions on EWA’s acceptance of the \$23.8
16 million. He didn’t recall exactly what everyone said after she told them the demand had been
17 accepted. He believed that Attarian, Migliore, Haddock, and Englert were also present in the
18 room at the time. Granof Depo. at 96-99.

19 Haddock testified that Jacobsen told the ALPA negotiators late in the afternoon that the
20 \$23.8 million figure was acceptable. He stated that Jacobsen did not reference the draft
21 settlement document when she announced the agreement to the money demand. Haddock
22 Depo. at 99, 110-111.

23 Englert testified that Jacobsen came into the room and said, “They have met your
24 \$23.8 million. They’ve met your number.” According to Englert, Jacobsen did not say
25 “agreement.” He also recalled Jacobsen asking that there be confirmation between the two
26 parties that they had come to a meeting of the minds on the number. He recalled that
27 Haddock and Migliore went down to confirm with EWA/EWW. Englert Depo. at 17-18

28 After Fausset agreed to ALPA’s demand for \$23.8 million, and Jacobsen said that “the

1 attorneys can take it from here,” Grant did not consider the issue of whether there would be a
2 settlement agreement and releases in the form Kline had prepared to still be an open
3 question. He understood there would be some things the lawyers would work on, but when he
4 heard Jacobsen say there was a deal, he understood that “all conditions precedent to the
5 formation of the agreement had been reached.” Grant Depo. at 79-87.

6 Grant testified that when Jacobsen came back to EWA after conveying EWA’s
7 acceptance of the \$23.8 million monetary figure to ALPA, she said there was a deal, and that
8 “based on the course of conduct,” he understood that the “deal” included “the material terms of
9 the documents.” Grant agreed, however, that after EWA had given Jacobsen the settlement
10 document to give to ALPA, nearly all of the following discussions concerned the dollar figure to
11 be arrived at between the parties. Grant Depo. at 119-120, 129-130.

12 Kline stated that the entire EWA bargaining team was present in the late afternoon
13 when Jacobsen conveyed ALPA’s proposal of \$23.8 million to EWA, and when Fausset
14 agreed to the \$23.8 million figure. According to Kline, at the time Fausset gave Jacobsen the
15 authorization to accept the \$23.8 million offer, Fausset told her it was the money plus the
16 settlement/release document – that they went together. Kline stated that previously in
17 Jacobsen’s discussions with EWA, Fausset had linked the money proposal and the
18 acceptance of the release and settlement document. Tr. at 192-193, 295 (Kline).

19 Kline testified that Jacobsen then left the EWA room, went back upstairs to ALPA’s
20 suite to communicate EWA’s acceptance of the money, returned with Attarian, came back into
21 the EWA room and said either, “You have a deal,” or “We have reached an agreement,” or
22 “We have an agreement,” and asked Fausset to accompany her outside the room. Kline saw
23 Fausset leave with Jacobsen, and stated that he next saw Fausset and Jacobsen a few
24 minutes later. Tr. at 194-195; 294-296 (Kline).

25 The ALPA bargaining team then came downstairs to meet with the EWA team. This
26 was about 5:45 p.m. Kline recalled seeing Haddock, Attarian, Migliore, and Englert. He
27 couldn’t recall whether Granof came down for that meeting or not, but stated that Jacobsen
28 was present briefly. According to Kline, it was “quite exuberant in the room, people shaking

1 hands, going around the room.” Kline stopped and talked a little bit with Attarian, saying
2 something to the effect of, “Congratulations. You know, we did it again. We reached another
3 agreement.” Attarian responded with similar words, adding that “it turned out not to be a fool’s
4 errand after all.” Kline shook Attarian’s hand, and also recalled shaking hands with Haddock
5 and Migliore. Tr. at 195-197 (Kline). Kline also stated that Fausset and Attarian shook hands
6 on the “agreement.” Tr. at 295 (Kline).

7 Grant recalled Jacobsen asking Fausset to go out and shake hands. Although Grant
8 believed “there had been a handshake,” he himself did not witness a handshake. He stated
9 that Jacobsen left quickly because she had to catch a plane. He also stated that Jacobsen
10 never said that the attorneys had looked at the agreement and that ALPA had agreed to all
11 terms. Grant Depo. at 60-69.

12 Haddock recalled shaking hands with Fausett at the end of the day and saying,
13 “Hopefully, we can put something together.” According to Haddock, Fausset did not say
14 anything to Haddock to indicate he believed the parties had a settlement. Haddock Depo. at
15 106-08.

16 Granof was not aware of Fausset and Attarian accompanying Jacobsen to a place
17 away from the ALPA meeting room after she had announced EWA’s acceptance of the money
18 demand. Nor was he aware of Fausset and Attarian exchanging any further terms of
19 settlement between them after the agreement was reached on the money demand. Granof did
20 not recall Jacobsen inviting all the participants into the room to shake hands with one another
21 after the agreement was reached on the money, and did not himself recall shaking hands with
22 any of the negotiators at the conclusion of the mediation. Granof Depo. at 104-105.

23 When she was deposed in September 2004, Jacobsen was able to recall only a few
24 details of the February 2003 mediation because her memory had been affected by the course
25 of chemotherapy she had undergone in 2004. She did not recall bringing Fausset and
26 Attarian together late in the day, and didn’t recall any handshake. She stated, however, that
27 she did have a practice of bringing the parties together to congratulate one another at the
28 conclusion of a successful mediation. As best she could recall, she had left the mediation on

1 February 5 believing that there was an agreement that was contingent on a release from the
2 pilots. Jacobsen Depo. at 46-48, 65-66, 78.

3 Jacobsen recalled that there was an agreement on the money and that the ultimate
4 agreement was contingent on the releases being resolved or acquired or achieved or worked
5 out. Jacobsen Depo. at 66, 69, 81-82. When she used the terms “achieved” or “acquired” or
6 “worked out” in reference to the releases, Jacobsen meant that the contingency involved
7 ALPA and EWA negotiating and reaching agreement on the terms of a release and waiver.
8 Jacobsen Depo. at 85. She added, however, “[I]f they’re still working something out, that’s not
9 a final agreement.” Jacobsen Depo. at 96-97. Jacobsen recalled that obtaining the releases
10 was important to the company, in order to justify paying out the \$23.8 million. Jacobsen Depo.
11 at 71, 87.

12 Jacobsen also recalled receiving a settlement proposal from EWA at the mediation,
13 which she passed on to ALPA. She did not read the EWA proposal, but rather simply
14 presented it to the ALPA representatives, and told them that the money was contingent upon
15 the parties being able to work out or negotiate a resolution to the release. She was not
16 specific about the kind of release, and believed the parties were going to be meeting after she
17 left the mediation to continue discussions on the subject of the release. Jacobsen Depo. at
18 72-76, 91. She didn’t recall ever saying that the agreement was contingent on ALPA’s
19 acceptance of the precise language regarding the releases that appeared in EWA settlement
20 document. Jacobsen Depo. at 88-89.

21 Attarian testified that Jacobsen never stated that ALPA and EWA had reached an
22 “agreement.” Tr. at 140 (Attarian).

23 Woerth stated that he would be surprised if Jacobsen had said that EWA and ALPA
24 reached agreement on all issues in the mediation. Moreover, no one has ever told him that.
25 Woerth Depo. at 63. Woerth testified that as president of ALPA, he never approved a
26 settlement of the shutdown grievance with Emery Air Freight. Woerth Depo. at 69-70.

27 The “2-on-2” Meeting

28 Migliore believed that shortly after communicating EWA’s acceptance of the \$23.8

1 million figure, Jacobsen suggested to Attarian that there be a follow-up meeting between
2 ALPA and EWA.⁹ Migliore believed the purpose of the meeting was to “touch base” – to
3 confirm that both sides had told each other face-to-face that \$23.8 million was the monetary
4 figure. Tr. at 400-401 (Migliore).

5 Granof recalled that after the call to Woerth, Migliore and Haddock went down to meet
6 with some of the EWA representatives, and that by the time they came back, there wasn't
7 much of the day left before dinner. Granof Depo. at 110. Granof didn't ask to be included in
8 the 2-on-2 meeting, wasn't asked to attend, and was “more than happy not to.” There wasn't
9 any reason for him to be there. He thought it was perfectly appropriate for Migliore and
10 Haddock to be the two people who went down there. Granof Depo. at 117-119.

11 The participants in the 2-on-2 meeting were Kline (for EWA), Grant (for EWW), and
12 Migliore and Haddock (for ALPA). Tr. at 139 (Attarian); Tr. at 199-200 (Kline); Haddock
13 Depo. at 78. Migliore stated that Attarian made the decision that Migliore and Haddock
14 should go down to meet with the EWA representatives. Tr. at 401 (Migliore).

15 Attarian testified that after the parties reached agreement on the numbers, two
16 members of the ALPA group (not including Attarian) went down to discuss the remaining
17 terms with EWA. Two remaining items for discussion were re-employment rights in the event
18 of a start-up, and the waiver. Attarian stated that Migliore made it clear that both inside and
19 outside counsel would look at the waiver language before any signoff. Tr. at 135-139
20 (Attarian).

21 Migliore testified that before he went down for the meeting, Attarian asked him what he
22 was planning to say. He told Attarian that he would tell the other participants that “we're there,
23 in terms of the number” – \$23.8 million – but that in terms of the four- or five-page draft
24 settlement document, any settlement proposal would have to be reviewed and approved by
25 the general counsel of ALPA legal department, the director of the ALPA legal department, and
26

27 ⁹ Jacobsen did not recall knowing that there was going to be a “2-on-2” meeting. She
28 recalled simply that there was going to be a further meeting after she left the mediation session.
Jacobsen Depo. at 93

1 outside counsel. Migliore and Haddock also planned to confirm the re-start date going from
2 2004 to 2007. Tr. at 401-402 (Migliore).

3 Once at the meeting, Migliore did say something to the effect of “We’re there on \$23.8
4 million.” He then stated that he did not have the authority to sign or approve the draft EWA
5 settlement document, and reiterated that it required approval by other people, including his
6 boss. Migliore recalled Kline saying something to the effect of, “It’s rough. I understand it’s
7 rough.” Migliore claimed that Kline never said, “We already have an agreement” or “You’ve
8 already accepted it.” Kline later told Migliore that he would be sending him another draft of the
9 settlement document after Migliore had returned to Washington, D.C., and Migliore testified
10 that Kline did in fact send one on February 14, 2003. Tr. at 404-408 (Migliore).

11 Migliore then spent some time reiterating ALPA’s concerns – specifically, that a
12 number of pilots had sent ALPA letters saying, “Don’t settle, or else.” He told Grant and Kline
13 that he believed ALPA would probably be sued. Tr. at 406-407 (Migliore). Migliore also
14 recalled some discussion about the types of claims that would be included in the waiver and
15 release. He stated that ALPA and EWA never agreed that if the waiver and release that EWA
16 wanted was legal, then they had a deal. Migliore recalled that Haddock indicated that there
17 might be pending grievances that had nothing to do with the shutdown, and shouldn’t be
18 included in any waiver and release. Migliore felt that Kline wanted “as much wrapped in as
19 possible,” and that the issue of what was included was not resolved at the 2-on-2 meeting, and
20 remained open to be negotiated. Tr. at 409-413 (Migliore).

21 Migliore recalled that Haddock raised the subject of the startup issue – that is, what
22 would happen if a CNF-affiliated company started another airline in the future. Migliore
23 believed that ALPA had communicated this issue to Jacobsen, and that she had
24 communicated ALPA’s concerns to EWA. Migliore testified that Kline agreed during the
25 2-on-2 meeting that the companies would move the date from 2004 to 2007, and would
26 include any air carrier affiliated with CNF. Tr. at 414-424 (Migliore).

27 According to Haddock, the 2-on-2 meeting occurred around 5:30 or 6:00 p.m.
28 Haddock Depo. at 74. Haddock didn’t know who arranged the meeting. He knew that

1 Jacobsen said that Fausset wanted the ALPA representatives to come down and talk with
2 Kline. Haddock Depo. at 90. According to Haddock, Attarian felt that it would be best if he
3 himself did not participate in the 2-on-2 meeting, and suggested that Haddock and Migliore
4 go instead. Haddock Depo. at 119, 126-127.

5 Haddock's understanding just prior to the 2-on-2 meeting was that the parties had
6 reached an agreement on the money, and that they could then start working toward a final
7 agreement. He thought that EWA was going to pay the \$23.8 million to resolve the shut-down
8 grievance and the remainder of the term of the CBA. He did not understand before he went to
9 the meeting that EWA intended that the payment of the \$23.8 million would be conditioned on
10 waivers of grievances and civil actions. Haddock Depo. at 104, 124-125.

11 Haddock testified that Migliore started the conversation with Kline and said that the
12 \$23.8 million figure was agreeable to ALPA, and then immediately discussed instructions
13 from Woerth regarding liability. According to Haddock, Migliore specifically referred to Kline's
14 draft and said it would have to be re-written somehow. Migliore said he would take it to his
15 boss, Jonathan Cohen, and outside counsel, and would review it as soon as he got back to
16 D.C. Haddock Depo. at 52, 57, 119-121.

17 Haddock recalled discussions in the meeting regarding DFR and other lawsuits. He
18 stated that Migliore was "fairly animated" regarding directions from Woerth with regard to the
19 DFR issue, and that ALPA had to make sure that the contract they had was reviewed by his
20 (Migliore's) boss and by outside counsel to ensure that ALPA was not left open to litigation.
21 Haddock Depo. at 82-83, 118-119. Haddock recalled Migliore saying, "We have other
22 lawsuits." Kline responded, "Well, they all have to go away." At that point Haddock thought it
23 "was actually going to come unraveled." That was when he wrote in his notes, "This may not
24 work." He said he had a "sinking feeling." Haddock Depo. at 83.

25 On the conversation regarding pending individual grievances, Haddock recalled Kline
26 saying, "We're not going anywhere unless those go away." Haddock said he responded,
27 "That isn't my understanding." Haddock wanted to make the point that the grievances had to
28 be treated separately, and he said as much to Kline. Kline responded, "No, they're going

1 away.” Haddock was “a little bit taken aback.” That’s when he wrote, “This may not be
2 possible.” Haddock Depo. at 84-86, 117-118, 124.

3 Haddock did not recall any discussion of holding back part of the \$23.8 million to cover
4 individual grievances. He believed ALPA had discretion to do that, however. Haddock Depo.
5 at 86-87, 119, 123. Haddock recalled Grant making the comment that he believed all the
6 lawsuits and the grievance would have to go away. Haddock Depo. at 88.

7 Haddock stated that at the end of the meeting, Migliore reiterated that his assignment
8 would be to take the settlement agreement back to ALPA counsel, general counsel, and his
9 boss. They would then have a review from the outside, and only then would it go to Woerth for
10 approval. Haddock Depo. at 88. According to Haddock, it was not a final agreement. He
11 described the “agreement” as a “TA” or – a “temporary agreement” in the collective
12 bargaining process. He also believed that any settlement of individual grievances would be
13 over and above the \$23.8 million. Haddock Depo. at 122-125.

14 At the conclusion of the 2-on-2 meeting, Haddock shook hands with Kline and Grant.
15 Haddock may also have shaken hands with Fausset out in the hall after the 2-on-2. He
16 recalled Fausset saying something along the lines of, “I’m glad you could make it out here so
17 we could work on this.” Haddock responded, “Hopefully we can, you know, put something
18 together.” Fausset then asked Haddock about his current employment with Federal Express,
19 and Haddock responded that it was “fine” and was “working out.” They then shook hands and
20 said, “Good-bye.” According to Haddock, Fausset did not say anything to indicate he
21 believed the parties had reached an agreement on all the issues under discussion during the
22 mediation session. Haddock Depo. at 106-107.

23 Englert testified that at the conclusion of the 2-on-2 meeting, Migliore and Haddock
24 came back into the ALPA room and confirmed that they had given the EWA representatives
25 the message they had discussed earlier. They also stated that there had been a meeting of
26 the minds on the \$23.8 million in “new money,” and that legal counsel for both sides “were
27 going to have to reach an agreement on some language because they had not done that at
28 that point in time.” Englert Depo. at 18-19, 50-51.

1 When Migliore referred to the “agreement on language,” Englert understood him to be
2 referring to the document Kline had given to Jacobsen to give to Migliore and Granof, which
3 document contained the settlement terms that the parties had not yet agreed to. Englert
4 believed this was the document Jacobsen brought in and handed to either Granoff or Migliore.
5 Englert stated that Migliore said he told Kline and Grant that it would have be reviewed by
6 ALPA in-house and outside counsel and they were going to get a “clean draft of stuff to work
7 on” during the week. Englert also stated they had not come to an agreement. Englert Depo.
8 at 51-53.

9 Kline testified that Jacobsen arranged the 2-on-2 meeting, that she called some time
10 after 4:00 p.m., and asked whether EWA would be amenable to changes and suggestions that
11 Migliore had in the waiver and release. He said she characterized these changes as
12 “strengthening” the release. Tr. at 198-199 (Kline).

13 According to Kline, the mood of the attendees in the 2-on-2 meeting was similar to that
14 in the “general meeting” that followed the parties’ agreement on the settlement figure. He says
15 “The mood was exuberant among the four of us in the room. We were very happy.” The
16 meeting was short, lasting about 10 minutes. Tr. at 199-200, 222-223 (Kline).

17 Kline stated that Haddock made several points during the meeting. One had to do with
18 whether there were any individual grievances still pending other than the shutdown grievance.
19 Kline told Haddock he did not think there were any pending grievances, but said he would
20 check further. Kline stated that Haddock “asked a variety of questions in order to implement
21 the settlement that had been reached earlier in the day.” Haddock wanted a list of pilots from
22 EWA, information about any pending individual grievances, information about any pilots that
23 were about to turn 60, information about any pilots that were on long-term disability. Tr. at
24 232-238 (Kline).

25 Kline testified that Migliore proposed changes to the provisions regarding waiver and
26 release – that he proposed adding specific references to the statutory exceptions, the Railway
27 Labor Act, and the WARN Act. Kline stated that Migliore explained that he wanted the RLA
28 referenced because it provides the basis for DFR lawsuits for airline and railway employees.

1 Kline claimed that Migliore wanted the reference to the WARN Act because there was already
2 an existing WARN Act case, so that pilots would be releasing any claims against EWA for
3 violations of the WARN Act. However, Kline also testified that the subject of the wording of the
4 release “never came up” at the 2-on-2 meeting. He stated, “They were never asked if they
5 agreed or not.” Tr. at 317-318 (Kline).

6 Kline testified that he also spoke to Migliore about the possibility of EWA and ALPA
7 issuing a joint press release to announce the settlement. He says Migliore asked that Kline
8 not do that, because ALPA wanted to release the information to its members itself. Tr. at 239-
9 240 (Kline).

10 Kline stated in addition that he, Migliore, and Haddock also discussed how the
11 settlement funds would be disbursed, and who would communicate the settlement package to
12 the pilots – whether it would come from ALPA or whether EWA would mail out the documents.
13 He claimed they did not reach resolution on that issue. He also recalled discussion about who
14 would communicate with the counsel representing the plaintiffs in the WARN Act case and in
15 the California action. Migliore was reluctant to do that, so Kline offered. According to Kline,
16 there were “a lot of . . . mechanics that still needed to be worked out.” Tr. at 240-242 (Kline).

17 On other points, Kline’s recollections differed sharply from those of the ALPA
18 participants. For example, Kline claimed that Migliore did not say anything in the 2-on-2
19 meeting to the effect that any agreement would have to be taken back to Woerth for review
20 and signature, and did not say that the draft settlement agreement waiver and release would
21 have to be reviewed by lawyers representing ALPA before there could be an agreement. Tr.
22 at 231-232 (Kline). Kline also testified that no one at the meeting ever said there could be a
23 problem with a release and waiver that covered outside lawsuits. Tr. at 319 (Kline).

24 Kline agreed, however, that no one signed any settlement agreement or settlement
25 document at the conclusion of the mediation. He also stated that in every grievance he has
26 ever settled in person, the parties have signed an agreement of some kind before leaving the
27 premises. Tr. at 292-293 (Kline).

28 Grant recalled attending the 2-on-2 meeting late in the afternoon. He stated that he

1 represented EWW, and that Kline represented EWA. Grant was aware of the whistle-blower
2 suit and WARN Act suit, and was aware that Rachford was attempting something with regard
3 to potential litigation. Grant Depo. at 44-47. Grant stated that the purpose of the 2-on-2
4 meeting was to make the agreement “as bullet-proof as possible,” to make it “as complete as
5 possible.” He believed there would be changes to the draft settlement documents, but didn’t
6 believe the draft was being renegotiated or that the “contours of the deal” were being
7 renegotiated. Grant Depo. at 71-74.

8 Grant didn’t recall Migliore saying that at the 2-on-2 meeting that the ALPA
9 representatives had not had time to review the draft settlement documents. He didn’t recall
10 any discussion about the president of ALPA, including whether he had approved the
11 agreement. Grant Depo. at 113.

12 Grant recalled Fausset saying that there needed to be some “tweaking” between the
13 parties. However, according to Grant, this was “tweaking” – not “negotiating.” He regarded
14 what they were doing as “technical work to finalize the document and finalize . . . the deal that
15 had been struck.” He stated that the matter wasn’t stated in terms of “final” or “draft” – it was a
16 “course of conduct . . . and there were matters discussed at that meeting that had to do with
17 what I regarded as the strengthening of the doc.” Grant Depo. at 74-78.

18 Grant agreed that the draft settlement document states that it is subject to the final
19 approval of the president of ALPA and the CEO of EWA. Grant Depo. at 78. However, Grant
20 agreed with Kline that Migliore did not say he didn’t have the authority to say there was an
21 overall deal until the terms had been subjected to further legal review, including review by the
22 head of ALPA’s in-house legal department and by outside legal counsel. Grant also said he
23 didn’t recall Migliore saying, in reference to the draft settlement document, that he (Migliore)
24 did not know what sort of waiver was possible under the circumstances. Nor did he recall
25 Migliore saying that the limits of what ALPA could agree to had to be “vetted” by ALPA’s
26 attorneys. Grant Depo. at 88-90.

27 Grant recalled some discussion of various other lawsuits, but did not recall that there
28 was any detailed discussion. Nor did he recall Haddock discussing the pending lawsuits.

1 What he did recall was a discussion of the \$23.8 million monetary figure, and ALPA's
2 allocation of that money. He also recalled Haddock asking about the pendency of the
3 individual grievances, but didn't recall any discussion about the substance of those individual
4 grievances. Grant Depo. at 90-93.

5 Grant recalled some discussion of the DFR issue and whether that should be
6 specifically mentioned in the context of the waiver. What he recalled about DFR was making
7 sure that the document was as bulletproof as possible with respect to that issue. Grant Depo.
8 at 93, 101-102. He didn't recall Haddock saying they could not resolve "all outstanding
9 matters" because there were pending individual grievances unrelated to the shutdown. Grant
10 Depo. at 93-95.

11 Grant also recalled a discussion regarding the need for the release to provide the most
12 complete protection possible for both ALPA and EWA. He stated that Migliore described the
13 Burley issue as "opt in/opt out" issue, and indicated that they were trying to determine the best
14 way within the context of the release to deal with the Burley issue. Grant Depo. at 95-97, 111-
15 112. Grant was aware that the pilots were being asked to sign a release giving up all claims,
16 and that they wouldn't get any money if they didn't give up even the non-CBA claims, and that
17 they wouldn't be able to pursue any individual grievances. Grant Depo. at 70-71. He recalled
18 Fausset saying that Kline could work with Granof and Migliore on the settlement release, but
19 didn't specifically recall Fausset saying that Kline and the ALPA attorneys could work on the
20 settlement agreement language. Nor did he recall Jacobsen saying (before she left for the
21 day) that ALPA's attorneys would want to look at the settlement agreement language, or that
22 ALPA would have to talk to Woerth about it. Grant Depo. at 56-64.

23 Grant agreed that as of the 2-on-2 meeting, there was going to be more work done on
24 the agreement, and there were going to be "follow-up drafts" submitted. His understanding
25 was that what they were doing was "to make an agreement that was the term of a deal in
26 which both parties had – you know, there had been offer, acceptance, all that jazz, and a
27 contract." He added, "What we were doing was essentially, you know, doing technical work on
28 the document, not renegotiating the terms of the deal." He stated that he didn't recall Migliore

1 saying that he would have either in-house or outside counsel look at any follow-up draft. Grant
2 Depo. at 99-101.

3 Grant's understanding by the end of the day was that the offer conveyed by Fausset to
4 Jacobsen was for \$23.8 million plus the provisions in the settlement documents. He believed
5 that "a deal" had been reached that included these two documents, and that the participants
6 had gone to the 2-on-2 meeting with this deal. He considered the discussion in the 2-on-2 to
7 have been "tweaking" – not "negotiating." Grant Depo. at 54-55, 65-69, 82-87.

8 Grant added, however, that his understanding that there was "a deal" did not come from
9 anything Jacobsen had said. He stated that Jacobsen had simply come back into the EWA
10 meeting room, and said there was a deal. Grant never heard directly from ALPA that ALPA
11 had accepted the terms of the written document, nor did he overhear anything to that effect
12 from anyone at ALPA. He recalled Jacobsen saying that both parties were at the same figure
13 – \$23.8 million. Grant Depo. at 56-61.

14 **EVENTS FOLLOWING THE MEDIATION**

15 Attarian returned to Washington D.C. the week after the mediation. Upon his return, he
16 gave Woerth a recap, advising him that the parties had reached agreement on the monetary
17 figure, that the startup issue was resolved, and that Migliore was working on the waiver issue.
18 Attarian testified that it was clear that the waiver was an open issue. He testified that Woerth
19 never signed any agreement, and never agreed to anything. Tr. at 140-144 (Attarian).

20 Woerth confirmed that after the mediation session, Attarian told him that there was still
21 more talking to do, that the discussions had not concluded. He said Attarian had indicated
22 that the last time the parties had talked on February 5, they were still negotiating the money
23 and were trying to get \$25 million (\$23.8 million new and \$1.2 million old). Attarian told
24 Woerth that Migliore would brief Woerth on the other issues – he mentioned waivers, and
25 settlement of other claims. Woerth Depo. at 43-49, 54. When Attarian returned to D.C., he
26 told Woerth, "We've gone as far as we're going to go" on the money, and that other open
27 issues remained. Woerth Depo. at 61-62.

28 After Kline returned to his office on February 7, 2003, he called Migliore – or Migliore

1 called him – to speak about “the data requirements” relating to the list of pilots and the
2 seniority lists, which had been discussed in the 2-on-2 meeting. Kline also got in touch with
3 Kierce, whom Kline stated had a “running dialog” with Haddock for the next month or so “in
4 terms of satisfying Mr. Haddock’s needs.” The parties agreed during that portion of Kline’s
5 testimony that during the period immediately following the mediation, ALPA continued to work
6 on the “matrix” for distribution of the settlement funds. Tr. at 243-248 (Kline).

7 Migliore testified that during the period immediately following the mediation,
8 representatives from ALPA and EWA continued to work on the distribution matrix. He stated
9 that they were “working to clean up the seniority list, which would be used as part of a
10 distribution matrix to eventually distribute money, if we ever got to an agreement.” According
11 to Migliore, they did this despite not having reached a final agreement, “because we were
12 hoping to get to an agreement, and we would need to do that in order to distribute money, if
13 and when we ever got to an agreement.” Tr. 425-426 (Migliore).

14 During February and March of 2003, Haddock worked with Englert on refining the
15 matrix that would be used to distribute the monetary settlement. Haddock testified that some
16 time near the end of March 2003, he realized that the \$23.8 million would not be distributed.
17 Haddock Depo. at 102-103.

18 Grant recalled only one conversation he had with anyone from ALPA following the
19 mediation. Granof had called him on February 10, basically saying, “Sorry I missed you [at the
20 mediation] – give me a call.” Grant did end up talking to Granof, and it was more of a personal
21 conversation. Grant recalled Granof saying something like, “Glad we got it done, glad it
22 worked out,” and Grant said something equivalent, and that was that. Grant Depo. at 132-133.

23 Kline testified that during this period (February of 2003, when the data requests were
24 being exchanged and satisfied, between EWA and ALPA), neither Migliore nor Haddock ever
25 said at any time that there was not a final settlement. Tr. at 249, 251 (Kline).

26 On February 14, 2003, Kline sent Migliore another draft of the proposed settlement
27 agreement. Exh. D-6. Kline said he had no reason at that point to believe that the “settlement
28 agreement reached on February 5th” would not be implemented by ALPA. Tr. at 251 (Kline).

1 Migliore recalled receiving this draft on February 14, 2003, and testified that he was expecting
2 to receive the revised draft because Kline had told him to expect it. Tr. at 424-435 (Migliore).
3 Kline admitted that this revised draft agreement did not state that the settlement agreement
4 had previously been approved. Tr. at 290 (Kline).

5 On February 28, 2003, Migliore advised Kline there might be legal problems with the
6 release. Tr. at 336 (Kline). Migliore called Kline, and indicated that there was a lawsuit either
7 filed or about to be filed, and he also indicated that he had retained outside counsel to
8 represent ALPA in that suit. Tr. at 251-252, 333-334 (Kline). According to Kline, Migliore told
9 him for the first time that “there was a problem in the settlement document, settlement
10 agreement,” in that “the settlement would require or the agreement they had would require
11 people who opted out of the settlement and retained their right to sue EWA in other forums
12 would not . . . benefit under the effects agreement that had been reached.” Nevertheless,
13 according to Kline, Migliore did not say that ALPA was “withdrawing” from the “settlement
14 agreement that had been reached on February 5” or from “the outcome of the February 5,
15 2003, negotiations.” Tr. at 252-253 (Kline).

16 Migliore also testified about this conversation, in which he explained to Kline that he
17 saw problems with the proposed release. The first problem was that the company was trying
18 to coerce pilots into giving up the outside claims that ALPA did not have the authority to settle
19 on their behalf, in return for receiving collective bargaining proceeds. The second problem
20 was that the proposed release would create a DFR problem for ALPA because ALPA’s
21 actions would not be reviewed under the DFR deferential standard. Migliore added that he
22 had not realized “until we got a revision and it was reviewed by people in addition to myself”
23 that one result of the waiver and release set forth in EWA’s draft settlement document would
24 be that pilots who did not agree to sign the waiver and release would nonetheless be barred
25 from pursuing a grievance on their own (without ALPA’s assistance). Tr. at 426-434
26 (Migliore).

27 According to Kline, when he reported his conversation with Migliore to EWA, he was
28 told to “deal with Mr. Migliore and try to convince him that the settlement was in place and was

1 valid the way it was agreed to on February 5th.” About a week and a half later – on March 11,
2 2003 – Kline sent Migliore an e-mail indicating that while he (Kline) did not have authority to
3 present a proposal, he offered Migliore a “what-if” in order to “try to address his need.” Kline
4 suggested a plan whereby even pilots who did not opt in to the settlement would receive some
5 money out of the settlement pool – a minimal amount, whether or not they signed the waiver.
6 “Everyone would get X dollars as part of the effects settlement, whether they signed a waiver
7 or not. The waiver would only be between the Company and pilots.” He asked Migliore his
8 thoughts. Exh. D-36; Tr. at 254-259, 337-339 (Kline). Kline testified that this was not a
9 “counterproposal,” but was “a methodology to salvage what I saw as the agreement beginning
10 to come apart,” made “on a lawyer-to-lawyer basis.” Tr. at 256-259 (Kline).

11 The same day, Migliore responded to Kline’s two-tiered proposal. Migliore advised
12 Kline, “We strongly believe that the outside lawsuits are not within ALPA’s collective
13 bargaining bailiwick and are accordingly outside of our collective bargaining discretion.” In
14 addition, he stated that “DFR deference strongly counsels against such a waiver being
15 wrapped into the settlement of this collective bargaining matter.” Exh. D-34; Tr. 340-341
16 (Kline).

17 On March 14, 2003, the complaint in Rachford v. Emery Worldwide, C-03-1103 PJH
18 (“Rachford I”) was filed, for the purpose of stopping the arbitration that was set to begin on
19 March 24, 2003. Kline received a copy of the Rachford I complaint from ALPA on March 17,
20 2003. On March 27, 2003, counsel for ALPA wrote Kline a letter proposing putting the
21 settlement money in escrow and dismissing the shut-down grievance until court had ruled in
22 the Rachford I suit. Migliore also sent Kline an e-mail. Tr. at 350-353 (Kline); Tr. at 440-441
23 (Migliore).

24 On March 27, 2003, Migliore sent Kline a letter on ALPA letterhead containing a
25 “settlement offer.” Exh. D-7; Tr. at 440 (Migliore). In the letter, Migliore stated that ALPA was
26 willing to put the settlement funds in an escrow account “until legal challenges, if any, to this
27 settlement are resolved.” However, he stated that ALPA would not agree “to the inclusion of
28 any matter in this settlement relating to outside litigation involving state law statutory claims or

1 WARN Act claims.” He also stated that if ALPA did not receive a response by March 31,
2 2003, ALPA would take steps to reschedule the arbitration of the shutdown grievance.

3 On March 31, 2003, Kline wrote a letter stating that EWA rejected ALPA’s settlement
4 offer, Tr. at 265 (Kline), because “[i]n my view there is nothing pending for EWA to either
5 accept or decline.” Kline’s letter continued, “On February 5, 2003, Howard Attarian and Don
6 Fausset, representing ALPA and EWA, respectively, effectively concluded an effects
7 agreement with respect to the December 2001 shutdown of EWA. The effects agreement
8 contained specific terms and conditions, including a requirement that every pilot participating
9 in the \$23.8 million settlement would release EWA, its affiliates and parents, from pending or
10 future litigation over employment-related matters.” Exh. D-8.

11 On April 4, 2003, Migliore wrote a letter responding to Kline’s claim that EWA and
12 ALPA had already “effectively concluded an effects agreement with respect to the December
13 2001 shutdown of EWA.” Exh. D-9. Tr. at 442 (Migliore). Migliore stated that the waiver
14 provision was “legally flawed” and therefore unacceptable to ALPA. He explained that “[t]he
15 law imposes upon ALPA obligations under the duty of fair representation and the LMRDA that
16 we do not believe would permit us to preclude relief for claims under the collective bargaining
17 agreement and subcontracting sideletter for pilots who refuse to waive any and all other
18 noncontract claims, such as state statutory whistle-blower claims and any individual statutory
19 employment or civil rights claims.” He stated further that there was no final settlement because
20 final settlement terms were never agreed to, noting that a number of outstanding issues
21 remained unresolved after the conclusion of the San Francisco mediation.

22 Migliore says that during this entire period from the end of the mediation session on
23 February 5, 2003, through March of that year, Kline never said there was a final settlement,
24 and never said there was an agreement on the scope of the waiver. Tr. at 439-443 (Migliore).

25 Kline stated at the hearing, in response to questioning by the court, that in his opinion,
26 the settlement agreement was final as of February 5, 2003, and that it included the monetary
27 settlement and the provisions in the final settlement agreement, including the waiver and
28 release. He claimed that EWA simply “adopted” Migliore’s “suggestions” after February 5.

1 He conceded that the fact that there would be a release was a material condition, and stated
2 that EWA was prepared on February 5 to “make changes to the scope of the release.” Tr. at
3 267-269 (Kline).

4 Kline testified that during the period between March 1, 2003, and March 11, 2003, he
5 had a number of conversations with Migliore – and later, beginning in mid-March, he, Migliore,
6 and ALPA’s counsel Stephen Berzon (“Berzon”), had at least three conversations regarding
7 whether the waiver and release was “legal,” and that at no time did either Migliore or Berzon
8 say there was no settlement on February 5. Tr. at 260-263 (Kline). However, he also testified
9 that he never affirmatively said to them, “But we have a final settlement agreement.” Tr. at
10 354-355 (Kline).

11 Kline asserted that “the basic condition was, and what we put the money on the table
12 for was, the fact that there would be a release. And we were prepared to tweak.” He agreed
13 that the only thing that was entirely agreed upon was the amount of the money. He stated,
14 “The tweaking that I had proposed, at least in the form of a suggestion to Mr. Migliore, that the
15 settlement provide for money for even the opt-outs. It wouldn’t have affected anything to do
16 with the February 14 document, because the waiver and release would still have been in place
17 as well as the final settlement agreement would still have been in place.” However, Kline
18 stated, after Berzon was retained by ALPA, “the complexity of the problems that Mr. Berzon
19 foresaw in the settlement release was much greater than we had contemplated. And that
20 reallocation suggestion that I had made would not have accommodated the subsequent
21 problems as identified by Mr. Berzon.” Tr. at 269-271 (Kline).

22 THE LAWSUITS

23 Following the above-described events – the furloughs and lay-offs of the flight crew
24 members, the arbitration of the August 2001 grievance, the February 2002 mediation session,
25 and the February 2003 mediation session – several lawsuits were filed, including Rachford I,
26 in which former EWA flight crew members seek a declaration of their rights to present
27 personally their claims for damages for loss of employment, including the loss of employee
28 benefits, in whatever forum jurisdiction is properly found; Rachford v. Emery Worldwide, C-03-

1 3618 PJH ("Rachford II"), a proposed class action, in which former EWA flight crew members
2 seek a finding that ALPA did not enter into a settlement of the shutdown grievance, which the
3 plaintiffs in Rachford I seek to prosecute personally; and Air Line Pilots Assn., Int'l v. Emery
4 Worldwide Airlines, Inc., C-03-1449 PJH ("ALPA"), in which ALPA seeks a determination of
5 whether the parties did in fact reach a settlement of the shutdown grievance, and also seeks
6 an order compelling arbitration of the shutdown grievance.

7 EWA filed a motion to dismiss Rachford II, arguing, in part, that it had reached a
8 settlement of the shutdown grievance with ALPA. EWA asserted that the EWA-ALPA
9 "settlement" was the culmination of "effects bargaining" required under the RLA and which had
10 commenced in August 2001. EWA contended that those negotiations resulted in the
11 resolution of all "major" and "minor" disputes between ALPA and EWA, including matters
12 relating to the "effects" of EWA's cessation of operations on its pilots ("major"), and the
13 settlement of all pending and future grievances that ALPA had or could raise against EWA
14 ("minor"). Plaintiffs argued in opposition to EWA's motion that while ALPA and EWA may
15 have reached a "settlement" of the grievance, ALPA was not authorized to enter into such a
16 settlement. ALPA, also a defendant in the case, argued that no settlement had been reached.

17 On May 12, 2004, the court heard argument in a motion for leave to file an amended
18 complaint in ALPA, and a motion for leave to file a second amended complaint and three
19 motions to dismiss in Rachford II. In both motions, a central disputed issue was whether EWA
20 and ALPA had reached a settlement of the January 31, 2002, shutdown grievance.

21 EWA argued that the parties had reached agreement on all issues, including the
22 monetary amount of the settlement and provisions relating to a civil litigation waiver and
23 release of all claims by the flight crew members. ALPA asserted that the parties had reached
24 agreement on some but not all of the terms of the settlement, and that issues relating to the
25 waiver and release were still open for negotiation. In an order filed May 28, 2004, the court
26 ordered limited discovery, and scheduled a date for an evidentiary hearing, on the sole issue
27 of whether a settlement had been reached.

28

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Railway Labor Act governs the formation, construction, and enforcement of labor-management contracts between air carriers and their employees.¹⁰ The RLA requires carriers and employees to make reasonable efforts “to make and maintain” collective bargaining agreements. 45 U.S.C. § 152 (First). It extends to disputes concerning the making of collective bargaining agreements, as well as to grievances arising under existing agreements. Norfolk and Western Ry Co. v. Am. Train Dispatchers’ Ass’n, 499 U.S. 117, 132 (1991).

EWA is an air carrier governed by the RLA, and ALPA is a union certified to represent EWA’s pilots. Because defendants¹¹ assert that an agreement was reached to resolve a grievance brought pursuant to a collective bargaining agreement governed by the RLA, the court’s interpretation of the parties’ attempt to settle the grievance is governed by federal common law and guided by the general common law of contracts. See Local 107 Office & Prof. Employees Int’l Union v. Offshore Logistics, Inc., 380 F.3d 832, 834 (5th Cir. 2004).

The question the court must resolve is whether EWA and ALPA reached an enforceable agreement to settle the January 2002 shut-down grievance. A settlement agreement is a type of contract. Like any contract, a settlement agreement is a bargain in which there must be a manifestation of mutual assent to the material terms of the agreement. See Restatement (Second) of Contracts §§ 1, 17(1), 18; see also Ass’n Mexican-American Educators v. State of California, 195 F.3d 457, 464 (9th Cir. 1999) (“a contract represents a ‘meeting of the minds’”); Callie v. Near, 829 F.2d 888, 891 (9th Cir. 1987) (formation of agreement requires “agreement on all its material terms”).

Thus, in order to establish the existence of an enforceable agreement, defendants must establish that both EWA and ALPA assented to be bound. E. Allan Farnsworth, Contracts

¹⁰ Air carriers and their employees were made subject to the RLA in 1936. 45 U.S.C. §§ 181, 182.

¹¹ EWA refers in its papers to “defendants” EWA, EWW, and CNF. These are the defendants in the ALPA case (No. C-03-1449 PJH).

(1982) § 3.1. Assent to the formation of the contract must be manifested in some way, by words or other conduct, to be effective. Id. The existence of mutual consent is determined according to an objective standard applied to external manifestations or expressions. Id. § 3.6. Where the parties have not agreed to all the essential terms, no binding contract exists. Roth v. Garcia Marquez, 942 F.2d 617, 627-28 (9th Cir. 1991).

In addition, the agreement must be sufficiently definite to be enforceable. The requirement of definiteness is “implicit in the principle that contract law protects the promisee’s expectation interest.” Farnsworth § 3.1. In order to determine contract damages, or to order specific performance or injunctive relief, a court must determine the scope of that promise with some precision. Id.; see also Inamed Corp. v. Kuzmak, 275 F.Supp. 2d 1100, 1120 (C.D. Cal. 2002) (to be enforceable, a promise must be sufficiently definite that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages) (citations and quotations omitted).

The participants in the February 5, 2003, mediation session bargained over six issues – the amount of the settlement fund; the mechanics of the allocation of the settlement monies; the rehiring obligations of EWA and its affiliates in the event of a start-up of the airline; the termination of the CBA; the termination of the bargaining relationship between ALPA and EWA; and the scope of a civil litigation waiver and release to be signed by the individual pilots as a condition to receiving monies from the settlement fund.

During the course of the February 5, 2003, mediation session, the parties agreed to payment by EWA of a settlement amount of \$23.8 million, to be allocated among the participating pilots by ALPA. This amount, combined with the \$1.2 million awarded to ALPA by Arbitrator Harris, brought to \$25 million the amount that EWA agreed it would pay ALPA (to be distributed to the pilots). The parties also agreed that in the event EWA or any of its affiliates (including CNF) launched a new air carrier at any time prior to September 2007, eligible former EWA pilots would be rehired. The parties understood that once they had agreed to a settlement of the shutdown grievance, the CBA would be terminated, as would the

1 bargaining relationship between EWA and ALPA.

2 The parties dispute whether they reached agreement on the civil litigation waiver and
3 release. The parties agree that the scope of the civil litigation waiver and release was a
4 material term of the purported agreement to settle the shutdown grievance. Thus, in order to
5 establish that there was an enforceable final settlement which included the civil litigation
6 waiver and release, defendants must show that both parties agreed to a specific form of
7 waiver and release.

8 Defendants argue that ALPA and EWA entered into a binding effects agreement on
9 February 5, 2003, which was subject to a condition subsequent. In their post-hearing brief,
10 defendants describe this condition subsequent as “construction of the [settlement]
11 agreement’s litigation waiver and release to maximize ALPA’s protection from inevitable
12 claims by disgruntled members that ALPA had breached its duty of fair representation to its
13 members.” Alternatively, defendants suggest that the condition subsequent was the
14 determination of the legality of the actual waiver and release contained in the draft settlement
15 agreement prepared by EWA.

16 ALPA, on the other hand, asserts that there was no final settlement, for three reasons.
17 First, ALPA contends that there are no objective indicia of agreement to a final settlement –
18 no signed document, and no other evidence of assent to all terms of a final settlement.
19 Second, ALPA asserts that Woerth never approved a final settlement agreement – a
20 requirement under ALPA’s constitution and bylaws. Third, ALPA argues that the parties did
21 not agree on the scope of a waiver/release, and there was accordingly no meeting of the
22 minds on all material terms of the agreement.

23 Having considered all the evidence presented and the applicable legal authority, the
24 court finds that EWA and ALPA did not reach agreement on a final settlement of the January
25 2002 shutdown grievance because they did not at any time agree on the scope of the civil
26 litigation waiver and release. The evidence shows that the participants in the Dallas 2002
27 mediation discussed the possibility and the advisability of including a waiver and release
28 provision. From the limited evidence presented, it appears that both the EWA representatives

1 and the ALPA representatives viewed a waiver and release – in theory – as an advisable or
2 even a necessary element of any final settlement of the shutdown grievance.

3 However, the evidence reflects that the parties reached no agreement on that issue in
4 Dallas or during the period between the Dallas mediation and the February 2003 mediation in
5 San Francisco. Tr. at 168, 277 (Kline); Tr. at 386 (Migliore); Tr. at 43 (Attarian); Granof Depo.
6 at 49-53. Kline admitted that the parties had not agreed on any term of a settlement prior to
7 February 5, 2003. Tr. at 175, 277-279 (Kline). Moreover, the scope of the waiver and release
8 discussed during the Dallas negotiations was different from scope of the waiver and released
9 proposed by EWA in its draft settlement document presented during the San Francisco
10 mediation. Thus, when EWA presented ALPA with the draft settlement document in the
11 afternoon of February 5, 2003, the ALPA negotiators had not yet had an opportunity to
12 consider whether ALPA would agree to the form of waiver and release contained in that
13 settlement proposal.

14 In Dallas, ALPA had disclosed its concerns to EWA regarding the so-called Burley
15 problem – that is, a number of pilots had informed ALPA that they did not want the union to
16 represent them in settlement talks regarding the shutdown grievance, and ALPA was
17 concerned that it might not have authority to settle for those pilots. ALPA suggested an “opt-
18 in/opt-out” waiver as the best way to address this problem. Tr. 384-385 (Migliore); Tr. 278-
19 279 (Kline); Exh. D-1 at 11-0250 to 11-0258. Pursuant to this form of waiver, a pilot who
20 opted out of a settlement could still proceed with a grievance through the System Board. Tr. at
21 385-386 (Migliore); Tr. at 279 (Kline); Exh. D-1 at 11-0250, 11-0255; see also Granof Depo at
22 51-52 (explaining his understanding prior to the San Francisco mediation that EWA was
23 interested in a waiver similar to the opt-in/opt-out waiver described by ALPA at the Dallas
24 negotiation, not one that would prohibit pilots from pursuing grievances if they did not
25 participate in the settlement).

26 By contrast, the waiver and release presented as part of the draft settlement document
27 in the San Francisco mediation would not have permitted pilots who opted out of a settlement
28 to pursue their shutdown grievance. Exh. D-3; Tr. at 310-311 (Kline). Moreover, the WARN

1 Act case and the whistle-blower case had not been filed as of the time of the Dallas
2 mediation, and waiver of such outside statutory claims was therefore not within the
3 contemplation of the parties, as it clearly was in the San Francisco mediation.

4 The parties agree that no temporary agreement was signed at the conclusion of the
5 February 5, 2003, mediation session, and that Woerth never signed an agreement settling the
6 grievance or approving the terms of a settlement agreement. Woerth himself testified that he
7 did not approve a final settlement. EWA was aware that ALPA's constitution requires
8 approval of the President to any agreement. EWA was also aware (as EWA had drafted the
9 proposed settlement document) that the settlement document stated that the settlement was
10 subject to presidential approval.

11 However, the court finds the lack of a signed agreement to be less significant overall
12 than the fact that the parties did not objectively manifest agreement to the scope of any
13 proposed waiver and release. Thus, they never reached a meeting of the minds on all the
14 material terms of the agreement. It is a general rule of contract law that where an essential
15 element is reserved for the future agreement of both parties, the promise can give rise to no
16 legal obligation until such future agreement. "Since either party by the terms of the promise
17 may refuse to agree to anything to which the other party will agree, it is impossible for the law
18 to affix any obligation to such a promise." In re Vylene Enter., Inc., 90 F.3d 1472, 1476 (9th
19 Cir. 1996). The scope of the waiver and release was an essential term of any settlement
20 agreement, which was left for future negotiation. Thus, parties did not agree on all material
21 terms of the settlement.

22 This is not a case of two parties agreeing to dispense with agreement over the precise
23 content of a particular substantive term. See, e.g., Eastern Air Lines v. Air Line Pilots Ass'n
24 Int'l, 861 F.2d 1546, 1551 (11th Cir. 1988) (agreement to dispense with "mutual assent" over a
25 given term is itself a product of "mutual assent"). ALPA never explicitly or implicitly agreed to
26 the proposed waiver and release or to every provision set forth in the draft settlement
27 document, and never agreed to a final settlement of the grievance, with the details of the
28 waiver and release to be determined later.

1 At most, some of the ALPA representatives indicated their understanding – both at the
2 time of the Dallas mediation, and in the San Francisco mediation – that any settlement would
3 likely include a provision for a waiver and release. However, no one from the ALPA team ever
4 agreed to the terms and scope of such a waiver and release. Moreover, the evidence shows
5 and both sides agree that the parties did not discuss the specifics of the waiver and release
6 with the mediator during the February 2003 mediation, and that the mediator focused her
7 efforts on helping the parties reach agreement on the monetary amount of the settlement.

8 There is no evidence that the parties bargained over any subject apart from the
9 monetary settlement during the morning session. From approximately 2:30 p.m. (shortly after
10 the commencement of the afternoon session), when Fausset instructed Jacobsen to convey to
11 ALPA the offer of \$20 million in “new money,” and also directed her to convey EWA’s draft
12 settlement document to ALPA, until approximately 5:30 p.m., when Fausset agreed to ALPA’s
13 monetary demand of \$23.8 million in “new money,” the focus of the bargaining was on
14 reaching agreement on the amount of the monetary settlement.

15 The evidence shows that when Fausset authorized Jacobsen to convey the \$20 million
16 offer and the draft settlement document to ALPA, Fausset told Jacobsen that EWA expected
17 ALPA to sign a “full release” and that the EWA representatives understood there needed to be
18 “some tweaking between the parties.” Before leaving the EWA meeting room, Jacobsen told
19 Fausset that if the ALPA negotiators found EWA’s monetary offer “in the ballpark,” they would
20 need to discuss it with Woerth.

21 Jacobsen communicated the \$20 million offer to ALPA after she left the EWA meeting
22 room at 2:35 p.m. At the same time, she handed the draft settlement document to Migliore,
23 telling him it included a rough draft of the waiver language, and that the lawyers were going to
24 have to work on it. There is no evidence, however, that Jacobsen discussed with the parties
25 any of the specific provisions of the draft settlement document, or that she did anything other
26 accept the document from the EWA representatives and hand it over to the ALPA
27
28

1 representatives.¹²

2 As of the time the ALPA negotiators concluded the telephone call to Woerth –
3 approximately 3:30 p.m., no agreement had been reached on any issue. During the next two
4 hours, the two teams continued to negotiate the amount of the monetary settlement. When
5 Fausset and Attarian met with Jacobsen in the “woodshed” at 4:21 p.m., the discussion was
6 focused entirely on the monetary amount. Following the “woodshed” meeting, the bargaining
7 continued with regard to the amount of the settlement. After Fausset had agreed to ALPA’s
8 \$23.8 demand, Jacobsen told the ALPA reps, “They’ve met your \$23.8 million” (or words to
9 that effect). The parties then met jointly to congratulate each other on successfully negotiating
10 the monetary settlement.

11 At some point – whether in the 3:30 p.m. meeting between Kline, Fausset, and Migliore
12 (which Migliore testified did not occur), or in the 2-on-2 meeting that followed the agreement
13 on the monetary settlement amount – the parties agreed on the provision regarding rehiring of
14 ALPA pilots in the event that EWA resumed flight operations. However, the evidence shows
15 no substantive discussion of the scope of a proposed waiver and release at any time during
16

17 ¹² Prior to the evidentiary hearing, defendants sought to depose Jacobsen, who lives in
18 the State of Washington. On September 23, 2004, U.S. District Judge Marsha J. Pechman, of
19 the Western District of Washington, heard a motion for a protective order asserting a claim of
20 privilege and seeking a ruling with regard to the effect of any privilege on the permissible scope
21 of questioning in the deposition. Without ruling definitively on the claim of privilege, Judge
22 Pechman set limits on the scope of the questioning, finding, “[T]hings that are privileged are what
23 was said behind closed doors, either by the mediator or to the mediator, and what her
24 impressions were of what was said.” She instructed the parties that they could take Jacobsen’s
25 deposition, and could ask about “for example, what her common practice is [and] when she left
26 [and] who was there” but that they could not ask about “what was said in those [closed] rooms.”
27 Transcript of September 23, 2004, hearing, at 4. Judge Pechman also instructed that Jacobsen
28 provide written responses to two questions – Was there an agreement? and What were the terms
of the agreement? – and that the responses be placed under seal for the use of this court, at its
discretion. Counsel presented the sealed Jacobsen declaration to this court at the evidentiary
hearing.

25 With regard to the deposition itself, neither side has raised any objection to Judge
26 Pechman’s ruling, and both sides cite the deposition transcript. This court accepts the deposition
27 on the same basis. Thus, the court has considered all of Jacobsen’s testimony with the exception
28 of her opinion as to the ultimate question. As to the ultimate question – whether there was a
settlement agreement – the court has not reviewed the sealed written responses, and does not
consider Jacobsen’s opinion as to that question relevant to the decision. The declaration remains
under seal and part of the court file for any appellate purposes.

1 the mediation. The subject does not even appear to have been mentioned until the 2-on-2
2 meeting, which occurred after Jacobsen had departed the hotel. There is no evidence that the
3 ALPA representatives objectively manifested assent to the waiver and release provision
4 during the course of the mediation.

5 The parties' continued negotiations following the February 5, 2003, mediation
6 demonstrate that neither ALPA nor the company considered that an agreement on waiver and
7 release had been reached on February 5, 2003. There is no evidence of any agreement
8 during the period immediately following the mediation. The evidence shows a continuing
9 course of negotiation – but no objective manifestation of agreement to the waiver and release.

10 EWA argues that the parties reached a binding agreement on February 5, 2003, with a
11 determination of the legality of the waiver and release as the only condition that could excuse
12 performance by ALPA. However, EWA's argument regarding the "condition subsequent"
13 would be relevant only if EWA were able to establish that ALPA and EWA reached a meeting
14 of the minds as to all material terms of the contract prior to the 2-on-2 meeting on February 5,
15 2003, and that ALPA's president actually or implicitly agreed to each of those terms.

16 EWA cannot show that there was a meeting of the minds as to all material terms of the
17 settlement agreement, because the evidence shows that the parties did not agree on the
18 scope of the waiver and release. There is no evidence that the EWA representatives
19 objectively expressed that the draft settlement document presented to ALPA during the San
20 Francisco mediation was intended as a final statement of the terms of settlement of the shut-
21 down grievance. Indeed, Kline admitted that the scope of the waiver and release was not final
22 as of February 5, 2003, and that the waiver and release remained subject to change after that
23 date. Tr. at 268-269 (Kline). In addition, ALPA made no proposal regarding the scope of a
24 waiver and release when Attarian gave Jacobsen ALPA's demand for 23.8 million after the
25 3:06 p.m. telephone call to Woerth, and there is no evidence showing that ALPA accepted the
26 waiver and release term of EWA's draft settlement proposal at any time.

27 CONCLUSION

28 In accordance with the foregoing, and based on all the evidence presented, the court

1 finds that the parties did not agree on a final settlement of the January 2002 shutdown
2 grievance.

3 The parties shall meet and confer, and shall submit, no later than July 6, 2005, a joint
4 status statement and a stipulation either setting a date for a further case management
5 conference, agreeing to proceed to arbitration, or setting forth a briefing schedule with regard
6 to any further motions they believe to be necessary.

7
8 **IT IS SO ORDERED.**

9 Dated: June 14, 2005

10 /s/
PHYLLIS J. HAMILTON
United States District Judge